

DATE: March 30, 1999
CASE NO.: 1999 WPC 3

In the Matter of

CHARLES E. ILGENFRITZ, JR.
Complainant

v.

UNITED STATES COAST GUARD ACADEMY
Respondent

Appearances: Mr. Scott W. Sawyer, Attorney
For the Complainant

LCDR Chris P. Reilly, U.S. Coast Guard
LCDR Glenn Sulmasy, U.S. Coast Guard
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610, and the Solid Waste Disposal Act (Resource Conservation and Recovery Act), 42 U.S.C. § 6971.¹ These statutory provisions prohibit an employer from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in activities to carry out the purposes of these environmental protection statutes. The proceeding in this case was conducted in accordance with the provisions of 29 C.F.R. Part 24.

¹In the initial complaints, counsel for the complainant cited the following statutes: the Toxic Substance Control Act 15 U.S.C. § 2622; the Solid Waste Disposal Act (Resource Conservation and Recovery Act (RCRA)), 42 U.S.C. § 6971; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; the Safe Drinking Water Act, 42 U.S.C. § 300j-9; and, the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (this last statute led to the “WPC” designation in the case title). At the conclusion of the hearing, complainant’s counsel indicated relief was being sought only under CERCLA and RCRA (Transcript, page 823).

Procedural Background

On October 2, 1998, Mr. Charles Ilgenfritz, through his counsel, Mr. Scott Sawyer, filed a discrimination complaint with the Occupational Safety and Health Administration, U.S. Department of Labor (OSHA). Mr. Ilgenfritz alleged he had been subjected to a continuing series of adverse actions which eventually resulted in his separation from employment by the United States Coast Guard Academy (USCGA) because he made protected disclosures. His complaint consisted of two parts. First, due to several environment disclosures made by Mr. Ilgenfritz in 1995 and 1996, he alleged being subjected to a hostile work environment, harassment, and retaliation for the following year and half prior to his leaving the USCGA under a workers' compensation program. Second, the complaint asserts that in retaliation for the same protected disclosures, the USCGA in September 1998 separated Mr. Ilgenfritz from employment. Mr. Ilgenfritz received the separation notice on September 3, 1998. On November 10, 1998, OSHA dismissed the complaint for untimeliness. OSHA believed Mr. Ilgenfritz had notice of the separation action prior to September 3, 1998 and did not find a continuing pattern of violations that would toll the reporting requirement relating to the hostile work environment. In response, Mr. Sawyer on November 13, 1998 requested a hearing with the Office of Administrative Law Judges.

Pursuant to a Notice of Hearing, dated November 23, 1998, I set a hearing date of December 21, 1998 (ALJ 1)². However, after receiving a request for a continuance by Mr. Sawyer for additional discovery time, I issued an Order of Continuance, dated December 3, 1998, approving a continuance over the objection of respondent's counsel and setting a new hearing date of February 17, 1998 (ALJ 2).

Meanwhile, on November 3, 1998, Mr. Ilgenfritz, through counsel, submitted another discrimination complaint to OSHA. Mr. Ilgenfritz alleged that when he received a disability retirement package from the USCGA on October 28, 1998, it included a personnel performance appraisal, dated May 1, 1997, which contained adverse comments in retaliation for his protected activity. On December 18, 1998, OSHA, after determining the complaint was timely, dismissed the complaint finding discrimination was not a factor in the rating. In response, on December 23, 1998, Mr. Sawyer again requested a hearing with the Office of Administrative Law Judges.

On February 17, 18, and 19, 1999, I conducted a hearing concerning both the October 2, 1998 and the November 3, 1998 complaints in New London, Connecticut. Mr. Ilgenfritz, Mr. Sawyer, LCDR³ Reilly, and LCDR Sulmasy were present.

²The following notations appear in this decision to identify specific evidence: CX - Complainant exhibit; RX - Respondent exhibit; ALJ - administrative law judge exhibit; and, TR - Transcript of hearing. Inadvertently, in the hearing, I did not identify the November 23, 1998 Notice of Hearing as ALJ I and the December 3, 1998 Order of Continuance as ALJ II.

³Lieutenant Commander.

Complainant's Statement of the Case⁴

Between 1993 and 1997, Mr. Ilgenfritz was employed at the steam plant on the grounds of the United States Coast Guard Academy. During the first couple of years of that employment, Mr. Ilgenfritz also served as the Hazardous Material Coordinator for the steam plant. In that capacity, he engaged in at least three protected activities. First, in the fall of 1995, he reported an oil spill under an emergency generator. Second, in 1996 he reported the improper disposal of a grit blaster⁵ which was hazardous material. And, third in 1996 he reported improper handling of paint chips that contained hazardous material.

In response to these protected activities, Mr. Ilgenfritz's supervisor, Mr. Eugene Bergeron, retaliated in several ways. In 1996, Mr. Bergeron removed Mr. Ilgenfritz's collateral duty as Hazardous Material Coordinator and re-assigned Mr. Ilgenfritz to more rigorous labor as a plant mechanic. Due to the increased physical strain associated with this re-assignment, Mr. Ilgenfritz eventually became disabled from shoulder pain. In the same time frame, Mr. Ilgenfritz's work environment became more hostile because Mr. Bergeron removed his access to a desk, a telephone, and a computer in the steam plant. In addition, Mr. Bergeron placed adverse comments in Mr. Ilgenfritz's last performance appraisal which was a departure from previous appraisals. Then, in 1998, when Mr. Ilgenfritz submitted paperwork to Mr. Bergeron to accomplish as part of Mr. Ilgenfritz's disability retirement application, Mr. Bergeron delayed completion of the paperwork. While Mr. Ilgenfritz was waiting for this paper work, the United States Coast Guard Academy involuntarily separated Mr. Ilgenfritz from employment; this separation action was initiated by Mr. Bergeron.

Mr. Ilgenfritz first became aware of the separation decision on September 3, 1998 and made a timely complaint under the employee protection provisions of various environmental statutes. Because of the continuing nature of the retaliation from a hostile work environment in 1996 to the separation decision in 1998 by Mr. Bergeron, Mr. Ilgenfritz has also rendered a timely complaint relating to the hostile work environment in 1996 and 1997. Finally, Mr. Ilgenfritz was not aware of the adverse 1997 performance appraisal until he received his retirement package on October 28 1998. As a result, his second whistle blower complaint concerning the adverse appraisal was timely.

As relief for the retaliation, Mr. Ilgenfritz seeks re-instatement as an employee of the United States Coast Guard Academy in some other position that will permit Mr. Ilgenfritz to receive government benefits as a federal employee. He also seeks some damage compensation for his shoulder injuries, loss of pay, and appropriate attorney fees. Mr. Ilgenfritz would like his last appraisal corrected and an order directing the posting of the decision if favorable.

⁴TR pages 11 to 16, 38, 820 to 848, and 880 to 887.

⁵A grit blaster is a machine than removes paint by directing sand and grit at high pressure at an object within a chamber.

Respondent's Statement of the Case⁶

This case, involves the personality conflict between a disgruntled employee and a supervisor who doesn't share his responsibilities with employees. From 1991 to 1993, Mr. Ilgenfritz, who had been hired as a boiler plant mechanic, worked as a mechanic in the steam plant. In 1993, responding to environmental concerns, the United States Coast Guard Academy (USCGA) established the Hazardous Materials Coordinator duty in various sections. At that time, Mr. Bergeron selected Mr. Ilgenfritz as the first Hazardous Materials Coordinator for the steam plant. Mr. Ilgenfritz performed that collateral duty over the next couple of years, with one break during a portion of 1994. In 1996, Mr. Bergeron assigned the Hazardous Materials Coordinator collateral duty to another steam plant employee to enable other workers to become proficient in the environmental area.

In preparation for a presidential visit in 1996, Mr. James Simmons, the supervisor of Mr. Bergeron, ordered the disposal of unused equipment sitting around in the steam plant. One of the items was a grit blaster. Following Mr. Simmons' order, Mr. Bergeron, with Mr. Ilgenfritz's help threw the grit blaster in a dumpster. Later, Mr. Ilgenfritz complained about the improper disposal of the grit blaster. Throughout the complaint process, Mr. Ilgenfritz did not raise a hazardous materials issue regarding the grit blaster. His complaint about the grit blaster involved the disposal of government property and was not a protected activity under the environmental statutes.

After Mr. Simmons observed plant employees lingering around a desk in the steam plant, he ordered Mr. Bergeron to remove the desk. Complying with that direction, Mr. Bergeron removed the desk and phone. The removal of the equipment was not retaliation. And, even though Mr. Bergeron limited Mr. Ilgenfritz's access to a computer, Mr. Ilgenfritz could still use the computer for boiler plant operator functions. There is no continuing pattern of retaliation between the events which occurred in 1996 and the 1998 separation action. Consequently, Mr. Ilgenfritz's October 2, 1998 complaint about a hostile work environment in 1996 is untimely.

Due to shoulder problems, which developed during Mr. Ilgenfritz's mechanic work in 1994, 1995, and 1996, Mr. Ilgenfritz left the USCGA in the spring of 1997 and received disability compensation for over a year. In light of manpower shortages at the boiler plant and based on medical information that Mr. Ilgenfritz was physically unable to return to his job as a mechanic, Mr. Bergeron initiated separation action to permit a new permanent worker to be hired. Commander Eric Brown, and not Mr. Bergeron, made the final decision to separate Mr. Ilgenfritz from government service. The separation action is not a disciplinary measure and did not involve retaliation. The USCGA treated Mr. Ilgenfritz's separation in the same manner as another boiler plant employee who was separated due to a physical inability to return to work.

When Mr. Ilgenfritz elected to apply for disability retirement, USCGA personnel assisted him in preparing the application. Mr. Bergeron received the retirement paper work on August 22, 1998 and forwarded it directly to the appropriate authorities on August 31, 1998. There was no retaliatory motive behind the delay and it did not prejudice Mr. Ilgenfritz's efforts to obtain a

⁶TR pages 17 to 32, and 848 to 880.

disability retirement.

The comments in the 1997 appraisal, even though adverse, are true observations about Mr. Ilgenfritz's performance. In addition, the appraisal was completed in June 1997 and available for Mr. Ilgenfritz's review. As a result, his complaint of retaliation in November 1998 due to the performance appraisal is untimely.

Issues

1. Whether Mr. Ilgenfritz's October 2, 1998 complaint of a retaliatory hostile work environment was timely.⁷
2. Whether Mr. Ilgenfritz's November 3, 1998 complaint of a retaliatory performance appraisal was timely.
3. If the complaint of hostile work environment is timely, whether the Respondent, the United States Coast Guard Academy, violated the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act and the Solid Waste Disposal Act (Resource Conservation and Recovery Act) by subjecting the Complainant, Mr. Charles Ilgenfritz, to a hostile work environment.
4. If the complaint of retaliatory performance appraisal is timely, whether the Respondent, the United States Coast Guard Academy, violated the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act and the Solid Waste Disposal Act (Resource Conservation and Recovery Act) by including negative performance comments in the last performance appraisal for the Complainant, Mr. Charles Ilgenfritz.
5. Whether the Respondent, the United States Coast Guard Academy, violated the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act and the Solid Waste Disposal Act (Resource Conservation and Recovery Act) by separating the Complainant, Mr. Charles Ilgenfritz, from employment.

Summary of Documentary Evidence and Testimony

⁷Respondent's counsel conceded there is no timeliness issue as to the portion of the October 2, 1998 complaint that addresses the separation action (TR, pages 34 and 35).

At the hearing I admitted, without objection, CX 1 to 5⁸ and CX 7 to 119 as the complainant's exhibits. Based on an objection from respondent's counsel, I did not admit CX 6 for identification (TR page 60).⁹ I also admitted RX 1 to 13, without objection.¹⁰

Complainant's Documentary Exhibits

CX 1 - Mr. Ilgenfritz's 1993 appointment calender
CX 2 - Mr. Ilgenfritz's 1994 appointment calender
CX 3 - Mr. Ilgenfritz's 1995 appointment calender
CX 4 - Mr. Ilgenfritz's 1996 appointment calender
CX 5 - Mr. Ilgenfritz's 1997 appointment calender

CX 7 - Mr. Ilgenfritz's position description, dated October 22, 1990, indicating his duties as a boiler plant equipment mechanic. In addition to accomplishing preventive maintenance and repairs on boiler equipment, a mechanic was also expected to stand watch over the boiler. The required physical effort is characterized as "moderately heavy." The job required frequent use of tiring positions including bending and kneeling and work in awkward positions for extended periods. The mechanic position requires frequent lifting and carrying of parts and equipment in excess of seventy-five pounds.

CX 8 - Appointment of Mr. Ilgenfritz by his supervisor, Mr. Bergeron, to handle mechanic inquiries during Mr. Bergeron's leave of May 20 to June 1, 1992.

CX 9 - Notice of performance award for Mr. Ilgenfritz, dated May 31, 1992.

CX 10 - Notice of performance award for Mr. Ilgenfritz, dated June 1, 1993.

CX 11 - Mr. Ilgenfritz's performance appraisal for the period April 1, 1992 to March 31, 1993.¹¹ His overall rating is "proficient" with job knowledge rated as "meritorious." In the appraisal, Mr. Bergeron praises Mr. Ilgenfritz for his job skill, ability to work under stress, and precision. Mr. Ilgenfritz is a "valued employee" who is a contributing "team player." The appraisal does not contain any negative comments or suggestions for improvements. The approving official is Mr. James Simmons.

CX 12 - Faxed copy of CX 11 containing the correct closing date of March 31, 1993.

⁸Complainant's counsel labeled all the exhibits, "plaintiff's exhibits." As previously indicated, I will refer to the exhibits using "CX" for complainant exhibit.

⁹CX 6 for identification is attached to the record.

¹⁰Respondent's counsel used RX 14 for identification to refresh a witness' recollection. He did not offer the document into evidence. RX 14 for identification is attached to the record.

¹¹The form has an administrative error indicating the closing date of the appraisal period as March 31, 1992.

CX 13 - Mr. Ilgenfritz's performance appraisal for the period April 1, 1993 to March 31, 1994. Mr. Bergeron rated Mr. Ilgenfritz "proficient" overall with meritorious ratings in job knowledge and handling hazardous waste duties at the plant. In particular, Mr. Bergeron singled out Mr. Ilgenfritz's skill in the hazardous waste area. There are no negative comments in the appraisal. Mr. Simmons signed the appraisal as the approving official.

CX 14 - E-mail message, dated August 4, 1994, from Mr. Ilgenfritz to Mr. Bergeron notifying him of fuel oil leaking around the base of a diesel generator onto the ground.

CX 15 - November 1994 notes by Mr. Ilgenfritz concerning his recommendation to Mr. Bergeron that personnel use tether lines when working in the tunnels. He reports Mr. Bergeron ridiculed the suggestion.

CX 16 - Handwritten notes, September to November 1994 by Mr. Ilgenfritz discussing a grievance based on the removal of his hazardous materials duties, blocked communications and perceived discrimination in the area of reporting in and the use of private vehicles for government business.

CX 17 and 18 - February 9, 1995 e-mail from Mr. Ilgenfritz to Mr. Bergeron about improving two-way personal communications.

CX 19 - Copy of March 13, 1995 environment inspection report of the boiler plant prepared by the Chief of the Environmental Section, Mr. J. Ingalsbe, noting several discrepancies and containing additional suggestions. The report also annotates Mr. Ilgenfritz's corrective actions.

CX 20 - Mr. Ilgenfritz's performance appraisal for the period April 1, 1994 to March 31, 1995. Mr. Bergeron rated Mr. Ilgenfritz "proficient" overall with no meritorious ratings in any area. Mr. Bergeron calls Mr. Ilgenfritz the "plants' key man in hazardous waste" and notes his "exemplary" job in keeping hazardous materials personnel records. Concerning his work within the group at the plant, Mr. Bergeron points out that Mr. Ilgenfritz is a "contributor." There are no negative comments in the appraisal. Mr. Simmons signed the appraisal as the approving official.

CX 21 - Mr. Ilgenfritz's indefinite designation as the hazardous waste coordinator for the boiler plant, dated June 13, 1995.

CX 22 - October 16, 1995 e-mail to Mr. Bergeron concerning several minor waste discrepancies.

CX 23, 24, and 25 - October 23, 1995 e-mail to Chief Petty Officer Colton identifying several items for disposal including an air compressor, small blowers, and a small cabinet blasting system (grit blaster). Mr. Ilgenfritz states the items are in operating condition but the grit blaster "needs some work."

CX 26 and 27 - Mr. Ilgenfritz's October 25, 1995 e-mail to LT (jg)¹² Opstrup reporting the loss of

¹²Lieutenant, junior grade.

approximately twenty-five gallons of fuel oil due to a leak in the emergency generator. The soil around the generator is soaked with oil.

CX 28 - October 26, 1995 e-mail summarizing the events concerning the fuel oil spill.¹³ Mr. Ilgenfritz discovered the oil spill on October 23, 1995 and reported it to Mr. Bergeron who stated he would inform the hazardous material officer, LT (jg) Opstrup. On the same day, Mr. Ilgenfritz sent an e-mail to LT (jg) Opstrup about the oil spill. After discovering the e-mail system had been down, he sent another e-mail on October 25, 1995.¹⁴ On October 25, 1995, Mr. Ilgenfritz overheard Mr. Paul Berkman asking Mr. Bergeron if he wanted a contractor to clean up the spill. Mr. Bergeron responded affirmatively. On October 25, 1995, Mr. Bergeron talked to Mr. Ilgenfritz about the spill. He wanted to know to whom Mr. Ilgenfritz had reported the oil spill. He also told Mr. Ilgenfritz to use face to face or telephone communications to report spills. Later, Mr. Ilgenfritz learned from Mr. Berkman that LT (jg) Opstrup had been away for the last several days and Mr. Berkman had not received a spill report from Mr. Bergeron. Finally, after the contractor arrived, Mr. Ilgenfritz told a representative that there could be deep soil saturation around the generator since it had been in the same place for fifteen years.

CX 29 - November 3, 1995 e-mail to Mr. Berkman about inventory profile numbers.

CX 30 - November 3, 1995 e-mail to Mr. Berkman about a coffee can containing an oily substance.

CX 31 - November 3, 1995 e-mail to Mr. Berkman about bringing a compressor into compliance.

CX 32 - November 3, 1995 e-mail to Mr. Berkman about neutralizing chemicals.

CX 33 - December 7, 1995 Letter of Appreciation from Chief of the Facilities Branch, CDR¹⁵ Florin, to Mr. Ilgenfritz for his several month effort to identify hazardous waste and waste streams at the boiler plant. In particular, CDR Florin singled out Mr. Ilgenfritz's superior work in completing the waste management plan. CDR Florin appreciated Mr Ilgenfritz's commitment to the U.S. Coast Guard environmental program and encouraged him to "keep up the great work!"

CX 34 - A canceled leave slip for January 17, 1995 with a note from Mr. Bergeron explaining the absence of one man and the medical appointment of another required canceling Mr. Ilgenfritz's requested leave.

CX 34A - April 26, 1996 letter from LT (jg) Opstrup to Mr. Ilgenfritz commemorating an environment assistance visit. The overall rating for the boiler plant was excellent.

CX 35 - June 7, 1996 e-mail to Mr. Ilgenfritz from LT (jg) Opstrup in reply to an inquiry about "possible lead paint."

¹³The caption of this e-mail indicates Mr. Bergeron sent it to Mr. Ilgenfritz. However, based on the comments in the e-mail, it appears Mr. Ilgenfritz and not Mr. Bergeron wrote the e-mail.

¹⁴See CX 26 and 27.

¹⁵Commander

CX 36, 37, and 38 - June 19, 1996 memorandum by Mr. Bergeron with an attached property pass discussing a damaged microwave oven and Mr. Ilgenfritz's reassignment to boiler plant mechanic duties. Mr. Bergeron asked Mr. Ilgenfritz whether he was going to repair or replace a damaged microwave. Mr. Bergeron indicated Mr. Ilgenfritz was annoyed and vocal about the request. Mr. Bergeron then informed Mr. Ilgenfritz that the bad feelings between him and Mr. Williams needed to end because he expected his mechanics to work as a team. And, because other personnel had been trained in hazardous material duties, Mr. Bergeron indicated he needed Mr. Ilgenfritz's expertise as a mechanic for the plant's summer overhaul. Mr. Ilgenfritz replied he preferred to work alone. But, Mr. Bergeron stated that usually would not be possible. CX 37 also contains a handwritten note concerning a weekend watch.

CX 39 - Mr. Ilgenfritz's performance award for 1995-1996 of \$140, dated June 27, 1996.

CX 40 - July 3, 1996 e-mail from PO¹⁶ Bauer to Mr. Ilgenfritz indicating paint chips from boiler plant kitchen area were hazardous waste containing lead and cadmium.

CX 41 - July 8, 1996 e-mail to Mr. Bergeron with copy to Mr. Berkman. Mr. Ilgenfritz states the inconvenience of not being able to use the steam plant workstation. He asserts the inability to use the work station disrupts and delays his hazardous materials duties.

CX 42 - Four undated grievance forms. The first form discusses disposal of the grit blaster May 1996, removal of paint chips from the plant's building side which might be hazardous material, and a June 19, 1996 incident when Mr. Ilgenfritz found Mr. Gibson raking up paint chips because they had cadmium in them. The second form covers a May 28, 1996 interview with CWO¹⁷ Eybel concerning property disposal. Mr. Ilgenfritz also describes how he damaged the glass control panel of the microwave about June 17, 1996 and Mr. Bergeron's questioning about restitution. The third form addresses the removal without notification of a phone and desk about June 6, 1996 that Mr. Ilgenfritz used for his hazardous materials duties. The only comment from Mr. Bergeron about the removal of the equipment was that he wanted Mr. Ilgenfritz to do more mechanical work. The fourth form discusses Mr. Bergeron's June 14, 1996 notification that he was removing Mr. Ilgenfritz from hazardous materials duty. Mr. Ilgenfritz pointed out he had received an appointment letter for his hazardous materials duties and would transfer responsibility when a letter removed those duties.

CX 43 - July 15, 1996 e-mail to Mr. Bergeron explaining his difficulties in making log sheet entries.

CX 44 - July 12, 1996 e-mail from PO Bauer to Mr. Ilgenfritz concerning asbestos removal procedures and his recommendation regarding the disposal of scrap metal and hazardous materials labeling.

¹⁶Petty Officer.

¹⁷Chief Warrant Officer.

CX 45 - July 16, 1996 typewritten note to "Len" describing the following alleged acts of retaliation. due to Mr. Ilgenfritz's collateral duties. (1) Under the heading of "retaliations received from performing my collateral duties of inventory and control of government property," Mr. Ilgenfritz states that on May 20, 1996 he was directed by Mr. Bergeron to dispose of the grit blaster "(used value over \$1200)" and other pieces of equipment which had been stored for disposal by DRMO.¹⁸ After reporting the incident and being interviewed, Mr. Ilgenfritz requested confidentiality due to a concern about Mr. Bergeron's reaction to the report. However, Mr. Bergeron was advised of the situation. Then, on June 6, 1996, a phone and desk Mr. Ilgenfritz had been using were removed without notice. (2) Under the heading, "retaliations received from performing and minimal support in my collateral duties of hazardous material coordinator," Mr. Ilgenfritz records his May 28, 1996 inquiry concerning whether the paint being removed from the side of plant building under Mr. Bergeron's order might be hazardous waste. Mr. Ilgenfritz asked that the report not be attributed to him because he would get in trouble for bringing it up. Then, on June 14, 1996, Mr. Bergeron took away Mr. Ilgenfritz's hazardous waste duties. On June 17, 1996, when he observed Mr. Gibson raking up the paint chips, Mr. Ilgenfritz discovered the test results were positive for cadmium and believes Mr. Bergeron may have been aware of that fact by June 14, 1996 or earlier. Mr. Ilgenfritz was troubled that he had not been notified formally of the test results. He also felt he was being excluded from issues because he was the hazardous materials coordinator. The incidents included disposal of a coil from a fuel oil heat exchanger, environmental violations in the garage, storage of confined space equipment, and storage of items intended for disposal such as the grit blaster, and an October 1995 oil spill. (3) In retaliation for performing general duties, Mr. Ilgenfritz described Mr. Bergeron's insistence that he repair or replace the damaged microwave oven on June 18, 1996. Mr. Bergeron had received a complaint about Mr. Ilgenfritz damaging the oven. Mr. Ilgenfritz brought another microwave oven in on July 2, 1996. However, Mr. Ilgenfritz believed, based on statements from the other employee, that Mr. Bergeron had manipulated the other employee into making the complaint. (4) Also in retaliation for performing general duties, Mr. Ilgenfritz stated he was locked out of a plant workstation because Mr. Bergeron changed the password, even though another employee was given the password to access the work station. (5) Also in retaliation for performing general duties, Mr. Ilgenfritz complained about a lack of communications when he ordered various supply items. (6) In retaliation for performing general duties, Mr. Ilgenfritz complained about the waste of government funds relating to replacement of steam traps and (7) purchase of a \$1,400 weather station for the plant. And, finally, (8) in retaliation for performing general duties, Mr. Ilgenfritz describes his perception of prejudice against him in the assignment of overtime in July 1996.

CX 46 - July 17, 1996 e-mail to Mr. Bergeron with attached overtime leave slips and a plant watch list regarding the disapproval of overtime.

CX 47 - Mr. Ilgenfritz's performance appraisal for the period April 1, 1995 to March 31, 1996 (Note: the dates on the form are April 1, 1996 to March 31, 1997, but that is an administrative error since the supervisors' signatures are dated May 1996). His overall rating is "proficient." In the appraisal, Mr. Bergeron praises Mr. Ilgenfritz for his development of a data program for the plant.

¹⁸Defense Resource Management Office.

He indicates Mr. Ilgenfritz did a “fine job” inventorying and disposing of hazardous waste. The appraisal does not contain any negative comments or suggestions for improvements. The approving official is Mr. James Simmons.

CX 48 - August 1, 1996 e-mail and transfer checklist informing Mr. Bergeron that Mr. Ilgenfritz has turned over his hazardous materials duties to Mr. Hancock. Mr. Ilgenfritz also offers his continued assistance.

CX 48 a - August 1, 1996 letter from Office of the Inspector General acknowledging receipt of Mr. Ilgenfritz’s complaint about a missing wrought iron gate.

CX 49 - September 6, 1996 note from Mr. Bergeron to Mr. Ilgenfritz informing him that Mr. Simmons wants to see him on September 7, 1996 about a training schedule.

CX 50 - August 7, 1996 e-mail concerning Mr. Ilgenfritz’s establishing another computer directory for hazard materials .

CX 51 - Time off incentive award, approved September 4, 1996.

CX 52 - Letter from Mr. Bergeron, through Mr. Simmons, to LT (jg) Opstrup, indicating that as of August 7, 1996, Mr. Hancock will take over hazardous materials coordinator responsibilities from Mr. Ilgenfritz. The stated purpose for the change is to enhance the hazardous materials knowledge of all steam plant employees.

CX 53 and 55 - September 18, 1996 e-mail to LCDR Brown expressing appreciation for his review of an outline.

CX 54- October 7, 1996 letter from Mr. Bergeron to Mr. Ilgenfritz setting normal duty hours as 0730 hours to 1600 hours and requesting a signed copy of the training administered by Mr. Hancock.

CX 55 - An undated cover sheet with an outline of suggestions for improving communications and resolving disputes, with several attachments. Mr. Ilgenfritz suggests regular group meetings, job meetings, and one to one personal meetings. He also encourages adoption of a professional and courteous work environment and recommends several good faith actions including replacement of a microwave oven, connection of a phone in the tool room, placement of a desk in the tool room for hazardous materials work, and better computer access. The first attachment to the outline is copy of the September 18, 1996 e-mail to LCDR Brown (CX 53). The next attachment is Mr. Ilgenfritz’s inter-office memo to LCDR¹⁹ Brown, dated October 2, 1996, expressing his view that he has been adversely affected by items IV and V of the outline. Item IV stresses the importance of honest communications in job accomplishment. Item V is simply a handwritten title “Abuse/harassment/prejudice.” (Note: the remaining portion of the page after this title has been cut

¹⁹By the time of the hearing, Lieutenant Commander Brown had been promoted to Commander.

off). The third attachment is an October 4, 1996 e-mail by Mr. Ilgenfritz to LCDR Brown requesting that his complaint be forwarded to CDR Florin. The subject line states “continued harassment.”

The fourth and fifth attachments are e-mail receipts for the third attachment. The sixth attachment is Mr. Ilgenfritz’s October 16, 1996 e-mail to CDR Florin thanking him for listening to him at their October 15, 1996 meeting. The seventh attachment is CDR Florin’s e-mail of October 16, 1996 accepting Mr. Ilgenfritz’s offer to tour the steam plant. The eighth attachment is an October 17, 1996 e-mail from Mr. Ilgenfritz to CDR Florin offering to supply names and phone numbers of personnel in the repair and supply division. The ninth attachment is an October 28, 1996 e-mail to CDR Florin stating Mr. Ilgenfritz’s view that little was accomplished during his meeting with Gene (Mr. Bergeron). He believes there is resistance to change in the steam plant. Finally, Mr. Ilgenfritz states “I do think it is appropriate to address with the Civil Rights/EEO officer about the abuse/harassment that evolved from the incident of disposing government property and the later act of my whistle blowing to CGI. With your concurrence, I’ll make an appointment with her.”

CX 56- Letter to Coast Guard Superintendent, dated October 31, 1996 from Mr. Ilgenfritz with an annotation that it wasn’t sent. The letter requests an appointment with the admiral to address how to deal with recent incidents.

CX 57 - A handwritten list of mechanic assignments for Mr. Ilgenfritz, dated November 8, 1996.

CX 58 - Copy of an e-mail, dated February 14, 1997 stating Mr. Ilgenfritz will no longer attend public works safety meetings.

CX 59 - A summary from Public Works Administration to Mr. Bergeron, dated March 18, 1997 listing the dates and times of Mr. Ilgenfritz’s sick leave from 1993 to 1997.

CX 60 - A summary prepared by Mr. Ilgenfritz stamped March 20, 1997 by Facilities Engineering outlining the factors of employment that relate to his shoulder impairment to support a “claim of occupational disease.” Mr. Ilgenfritz states that as of February 18, 1997 he is no longer able to perform any overhead work. Mr. Ilgenfritz “cannot say what specifically caused my present condition nor precisely when it happened.” Mr. Ilgenfritz essentially lists all strenuous activity he performed at work from 1994 to 1997. Sample tasks include removing manhole covers to access equipment, heavy equipment repair, and occasional heavy lifting.

CX 61 - Limited medical information release authorization to Dr. Giacchetto, dated April 1, 1997.

CX 62 - Mr. Ilgenfritz’s May 2, 1997 request to the “Working Supervisor, Steam Plant” not to send any correspondence by certified mail.

CX 63 - May 5, 1997 note documenting Mr. Ilgenfritz’s efforts to have his compensation paper work completed. Additional handwritten note, dated June 5, 1997 indicates Mr. Ilgenfritz still has not received pay.

CX 64 - A May 17, 1997 e-mail suggesting to "cdebolt" that paperwork would be processed faster if Mr. Bergeron did not send the material first to "Mary."

CX 65 and 66 - June 11, 1997 letter to Mr. Ilgenfritz from Mr. Bergeron directing him not to enter the steam plant "in an effort to protect you from possible injury."

CX 67 - Mr. Ilgenfritz's June 16 1997 response to Mr. Bergeron's order to stay out of the steam plant. The subject line states, "continued harassment." Mr. Ilgenfritz points out the plant is frequently visited by the public, relatives, and cadets. Considering Mr. Ilgenfritz's familiarity with the plant, he questions Mr. Bergeron's concern for his safety. Mr. Ilgenfritz then alleges the debarment is a continuation of other acts of harassment including the removal of his hazardous materials duties, desk, phone, and computer access. He believes these adverse actions started shortly after Mr. Ilgenfritz reported the disposal of government property. Mr. Ilgenfritz closes with a statement that he intends to contact Coast Guard personnel who can assist in curtailing the harassment.

CX 68 - August 19, 1997 letter to CDR Brown requesting the status of the security report regarding the lock that was cut from Mr. Ilgenfritz's locker to retrieve some tools.

CX 69 - Reply by LCDR Stephanos to Mr. Ilgenfritz's inquiry regarding the cut lock. LCDR Stephanos reports that other than poor judgment, the security investigation revealed "no wrong." The employee who cut the lock should have notified the supervisor prior to the act. Mr. Bergeron has counseled the employee and provided a replacement lock.

CX 70 - Mr. Ilgenfritz's September 2, 1997 request for the security report.

CX 71 - Mr. Simmons's September 9, 1997 response to Mr. Ilgenfritz's security report request. Mr. Simmons stated that the Academy Security Force did not conduct a formal investigation. Instead, there was an administrative review of the cut lock incident which lead to a finding of poor judgment. Mr. Simmons points out that the lock was on a shop tool locker and the person who cut the lock needed access to the tools. None of the contents were missing. As a corrective action, prior to any employee cutting a lock, he or she must notify the supervisor.

CX 72 - On November 17, 1997, at the direction of Ms. Hafey, Mr. Bergeron requests a recent medical evaluation.

CX 73 - Mr. Ilgenfritz's November 21, 1997 reply to Ms. Hafey indicating he would provide an evaluation only to her. He did not want Mr. Bergeron to have access.

CX 74 and 75 - Mr. Ilgenfritz's December 10, 1997 inquiry to Coast Guard officials as to the authority of a supervisor to receive medical information. He asserts his supervisor is attempting to get a prognosis on when Mr. Ilgenfritz will return to work. However, Mr. Ilgenfritz and his doctor do not have any definite answers.

CX 76 and 77 - Unsigned copies of letters to Ms. Keating in the Employment Standards Administration, dated April 16, 1998 and April 24, 1998, with administrative questions relating to his worker's compensation.

CX 78 - Unsigned June 1, 1998 letter to Ms. Keating with additional administrative questions. Mr. Ilgenfritz also complains about Mr. Bergeron's less than co-operative attitude in continuing to send Mr. Ilgenfritz information by certified mail.

CX 79 - Undated letter from Mr. Bergeron to Mr. Ilgenfritz advising him that he needs to make a selection by June 12, 1998 among several personnel actions including returning to work fully recovered, applying for retirement disability, or resigning.

CX 80 - June 14, 1998 e-mail to "cdebolt" requesting guidance in response to Mr. Bergeron's letter. He also seeks advice on how to remove Mr. Bergeron from his position "legally."

CX 81 - June 28, 1998 e-mail to Ms. Demuth with administrative questions regarding the retirement package.

CX 82 - July 1, 1998, Notice of Proposed Removal for Disability signed by Mr. Bergeron. Due to Mr. Ilgenfritz's continued inability to physically accomplish his job since February 18, 1997, the Coast Guard Academy intended to separate Mr. Ilgenfritz. The letter notified Mr. Ilgenfritz that any reply should be forwarded to LCDR Stephanos. He offered an opportunity to review the material supporting the separation action and advised of his right to apply for a disability retirement.

CX 83 - Ms. Demuth's July 7, 1998 e-mail response to Mr. Ilgenfritz's questions concerning disability retirement.

CX 84 - Ms. Demuth's August 19, 1998 e-mail to Mr. Ilgenfritz advising him of the necessity to get the supervisor's statement completed and signed to process his retirement package.

CX 85 - Ms. Demuth's August 24, 1998 e-mail thanking Mr. Ilgenfritz for the information that he has given Mr. Bergeron the forms to complete.

CX 86- Ms. Demuth's August 26, 1998 e-mail acknowledging receipt of the retirement documents and stressing the need to have the supervisor's statement completed.

CX 87 - CDR Brown's August 25, 1998 decision letter notifying Mr. Ilgenfritz of his decision to involuntarily separate Mr. Ilgenfritz from the Coast Guard Academy effective September 4, 1998. CDR Brown observes Mr. Ilgenfritz did not submit a reply to the initial notification of separation. CDR Brown once again advises Mr. Ilgenfritz concerning his potential eligibility for disability retirement. The attached envelope to Mr. Ilgenfritz bears a September 2, 1998 postmark (Note: the envelope does not bear any Coast Guard Academy identification).

CX 88 - Duplicate page two of CX 87.

CX 89 - Mr. Ilgenfritz's September 4, 1998 e-mail to Ms. Demuth asking about the effect of the separation action on his retirement package.

CX 90 and 91 - Ms. Demuth's September 8, 1998 e-mail reply informing Mr. Ilgenfritz that the agency may pursue a separation action. It is not considered a disciplinary action. The action does not interfere with Mr. Ilgenfritz's ability to apply for retirement.

CX 92 - September 8, 1998 agency certification by Mr. Hafey, based on supervisor's statement, that there are no vacant positions available which fit Mr. Ilgenfritz's present physical capabilities.

CX 93 - September 10, 1998 e-mail to Ms. Hafey asserting that his submission of both the supervisor form to Mr. Bergeron and the remaining retirement package to Ms. Demuth constituted his reply to the notice of proposed separation action.

CX 94 - Ms. Demuth's September 8, 1998 letter to Mr. Ilgenfritz describing his restoration rights upon physical recovery and avenues of appeal.

CX 95 - Cover letter dated September 9, 1998 with attached separation clearance checklist.

CX 96 - August 31, 1998 e-mail response by CWO Ovall on Mr. Ilgenfritz' 1996 FOIA request concerning the complaint he completed in June 1996 about the improper disposal of government property.

CX 97 to 101 - Copies of Mr. Ilgenfritz's applications for disability compensation from April 24, 1998 through June 18, 1998.

CX 102 and 103 - Supervisor statement signed August 31, 1998 by Mr. Bergeron.

CX 104 and 105 - Mr. Ilgenfritz's performance appraisal for April 1, 1996 to March 31, 1997 completed by Mr. Bergeron, who did not date his signature. Mr. Simmons signed as the approving official on May 1, 1997. Mr. Ilgenfritz's overall appraisal is "proficient." Mr. Bergeron praises Mr. Ilgenfritz for his work as the hazardous material person. But, Mr. Bergeron also identifies as problem areas, Mr. Ilgenfritz's difficulty in making timely repairs and inability to interact with other steam plants employees.

CX 106 and 107 - Mr. Ilgenfritz's federal income tax returns for 1996 and 1997.

CX 108 - Mr. Ilgenfritz's medical records covering a period, April 7, 1995 to May 15, 1998. Mr. Ilgenfritz presented in April 1995 to Dr. Giacchetto with a one year history of episodic left shoulder pain. Over the course of the next two years, periodic treatment helped to alleviate some of the pain. By early 1997, the left shoulder pain required physical therapy. In March 1997 when Mr. Ilgenfritz attempted to return to work, his shoulder pain became more severe. After leaving work, his physical condition improved slightly. Dr. Giacchetto imposed work restrictions due to Mr. Ilgenfritz's pain in both shoulders. In July 1997, the physician noted Mr. Ilgenfritz has suffered from Lyme disease.

By March 1998, the doctor assessed Mr. Ilgenfritz's disability at 8% for loss of left shoulder function and 13% for loss of right shoulder function.

CX 109 - Notes from a June 20, 1997 office visit with Dr. Giacchetto.

CX 110 - Affidavit of Ms. Mary Hafey, dated January 21, 1999. Ms. Hafey is a personnel staff advisor at the Coast Guard Academy. After reviewing Mr. Ilgenfritz's personnel records, she observes that Mr. Ilgenfritz first worked at the Coast Guard Academy from December 11, 1989 to March 1, 1990 as an accounting technician. He was rehired on April 21, 1991 as a boiler plant equipment mechanic as a Wage Grade 10. As of April 13, 1997, he had reached the maximum available step increase of Step 5. He was never denied a step increase or demoted during his employment. At the same time, the records do not indicate Mr. Ilgenfritz ever applied for a promotion. From April 8, 1997 to his separation on September 4, 1998, Mr. Ilgenfritz was on Leave Without Pay, receiving compensation benefits under the Federal Employees Compensation Act.

CX 111 - Affidavit of CWO Ernest Eybel, dated January 19, 1999. In October 1995 CWO Eybel was assigned as the Chief of the Logistic and Property Branch. He met Mr. Ilgenfritz in the spring of 1996 contacting him concerning the disposal of government property. At that time, Mr. Ilgenfritz described throwing out a sandblaster machine. Mr. Ilgenfritz stated Mr. Bergeron had illegally ordered him to discard the piece of machinery. Mr. Ilgenfritz did not mention anything about an issue of hazardous waste associated with the machine. CWO Eybel then discussed the disposal with Mr. Bergeron who indicated he cleared out the area due to the impending visit by the President of the United States. CWO Eybel advised Mr. Bergeron of the proper disposal procedures for government property.

CX 112 - Affidavit of Mr. David Piermattei, dated January 8, 1999. For the last six years, Mr. Piermattei has been a boiler operator at the Coast Guard Academy. He knew Mr. Ilgenfritz as a co-worker from 1992 to 1997. Mr. Piermattei maintains, on occasions, he had to finish jobs that Mr. Ilgenfritz left uncompleted. He thought Mr. Ilgenfritz was arrogant and turned a collateral duty as hazard materials coordinator into a full time job. As a result, if a boiler plant operator needed a mechanic, Mr. Ilgenfritz would refer the operator to the other mechanic, Mr. Williams. Mr. Ilgenfritz constructed his own office in the tool room which Mr. Bergeron eventually instructed Mr. Piermattei to dismantle in June 1996. Mr. Piermattei believes Mr. Ilgenfritz lost his office because he was a mechanic and did not warrant an office. Due to his physical problems, Mr. Ilgenfritz was assigned easier tasks. Mr. Piermattei complained about Mr. Ilgenfritz "smashing" the microwave oven control panel. When he confronted Mr. Ilgenfritz, he replied that he pushed the buttons and it broke. Mr. Piermattei asked Mr. Bergeron to report Mr. Ilgenfritz for destroying government property. Mr. Bergeron indicated Mr. Piermattei would have to take care of the issue himself, so Mr. Piermattei reported the incident to Mr. Simmons. While Mr. Ilgenfritz was out on compensation, he was not allowed back in the plant because it was under construction by contractors.

CX 113 - Affidavit of Mr. Patrick Williams, dated January 22, 1999. Mr. Williams was the other mechanic at the boiler plant. Hazardous Material Coordinator was a collateral duty, but Mr.

Ilgenfritz turned it into a full time job. Mr. Ilgenfritz was an inept mechanic who was also arrogant. Mr. Simmons decided to remove Mr. Ilgenfritz's office desk and phone. Concerning the microwave, Mr. Ilgenfritz "really mad about something, and it looked like he smashed it with his fist." In October 1995, a float stuck in the day fuel tank for the emergency generator causing an oil spill. Mr. Ilgenfritz e-mailed the hazardous materials officer and a contractor cleaned up the spill. Regarding the grit blaster, Mr. Ilgenfritz had tried to repair it but the machine didn't work very well. Some samples were tested from the machine including sand and paint chips. The paint chips contained lead. Because they didn't want another waste stream, the employees quit using the blaster. The sand was removed from the machine and the grit blaster was placed outside. Mr. Williams helped Mr. Bergeron and Mr. Ilgenfritz throw the machine in the dumpster as part of a presidential clean-up. The grit blaster was empty. Mr. Williams believes Mr. Ilgenfritz was angry because they threw away the grit blaster that he had spent time trying to repair.

CX 114 - Affidavit of Mr. Eugene Bergeron, dated January 21, 1999. Mr. Bergeron was Mr. Ilgenfritz's supervisor starting in 1991. In 1993, he selected Mr. Ilgenfritz to be the Hazardous Materials Coordinator for the plant as a collateral duty. He relieved Mr. Ilgenfritz of the job to rotate the responsible among the other employees. Mr. Ilgenfritz was a fair mechanic. When Mr. Ilgenfritz went out on compensation, the plant work force dropped 35% because another employee was also out on compensation. Mr. Bergeron believes the comments he made in Mr. Ilgenfritz's last appraisal were accurate. The letters sent to Mr. Ilgenfritz concerning his removal were prepared by Ms. Hafey. The letters were sent regular or certified mail. Mr. Ilgenfritz told Ms. Hafey he considered certified mail a form of harassment. Mr. Bergeron's role in the separation action was to replace 35% of his work force. Mr. Ilgenfritz was never demoted, blacklisted or given manipulated work duties. Likewise, he was not denied a promotion and Mr. Bergeron never yelled at any of his employees. The only authorized office in the plant was Mr. Bergeron's office. Mr. Simmons ordered the removal of the phone and desk because the employees kept congregating in the area. Because there was no authorized e-mail box for steam plant employees other than Mr. Bergeron's e-mail box. Mr. Bergeron doesn't know how Mr. Ilgenfritz got into the Coast Guard Academy computer system. Mr. Ilgenfritz was never denied overtime. After Academy security had determined Mr. Ilgenfritz willfully damaged the microwave, Mr. Bergeron asked him to replace it. Mr. Ilgenfritz brought in an old microwave and then indicated he expected the Academy to pay rent for it. In response, Mr. Bergeron purchased a new microwave with plant funds. Concerning the oil spill, a contractor excavated about three feet of soil and disposed of the contamination. Mr. Bergeron considered the grit blaster as part of a waste stream and wanted to get rid of it. At that time, the plant personnel cleaned out the blaster. Despite the proper paper work being completed in 1994, over a year passed and the blaster remained in the area. Finally, Mr. Simmons directed Mr. Bergeron to get rid of the blaster, so the "clean" grit blaster was thrown away.

CX 115 - Undated, affidavit of Mr. James Simmons. Mr. Simmons is the Chief of Utilities as the Coast Guard Academy and the supervisor of Mr. Bergeron. He was aware of Mr. Ilgenfritz's duty as hazardous material coordinator and boiler plant mechanic. Mr. Ilgenfritz was separated because he could no longer physically perform his duties. They followed standard civilian personnel procedures. The comments in Mr. Ilgenfritz's last appraisal accurately reflect his work performance. There are no promotion opportunities at the boiler plant. Mr. Ilgenfritz was not

harassed, demoted, or blacklisted. Mr. Simmons directed the removal of the phone and desk after he observed employees “hanging around.” After Mr. Piermattei complained about the damaged microwave, Mr. Simmons confronted Mr. Ilgenfritz who admitted he accidentally broke the oven. Mr. Simmons told Mr. Bergeron to dispose of the grit blaster. Mr. Bergeron said the blaster had been cleaned and it was taking a long time to dispose of it through proper channels. Mr. Simmons did not receive any report from Mr. Ilgenfritz regarding the grit blaster, an oil spill, or paint chip removal.

CX 116 - CWO Ovall’s FOIA response, dated January 28, 1999. According to CWO Ovall, the USCGA has been unable to locate any records responsive to his request.

CX 117 - Map of boiler plant

CX 118 and 119 - Handwritten and typed notes concerning October 2, 1996 meeting with Mr. Bergeron, Mr. Simmons, and CDR Brown discussing Mr. Ilgenfritz’s various allegations. Notes indicate Mr. Simmons directed removal of the grit blaster, desk and phone. He stressed the need for better communications.

Respondent’s Documentary Exhibits

RX 1 - Mr. Simmons April 7, 1997 response to Mr. Ilgenfritz’s request for light duty. Mr. Simmons indicated that submission of a medical report was necessary.

RX 2 to 9 - E-mail correspondence between Mr. Ilgenfritz and Ms. Demuth concerning disability retirement, dated June 16, 1998 to July 15, 1998.

RX 10 - Mr. Ilgenfritz’s personnel training record.

RX 11 - Mr. Ilgenfritz’s hand written comments, dated October 21, 1996, concerning a meeting with Mr. Bergeron about job expectations.

RX 12 - Mr. Ilgenfritz’s June 4, 1997 personal statement about a cut lock on his personal locker. He reported a bag of tools was missing.

RX 13 - Mr. Ilgenfritz’s October 28, 1996 e-mail about his unsuccessful meeting with Mr. Bergeron on October 21, 1996.

Summary of Testimony - for the Complainant

Mr. Charles E. Ilgenfritz, Jr.

Mr. Ilgenfritz joined the Navy in 1963 and served eleven years as a machinist helping to operate nuclear submarine steam plants. As a machinist, he received formal training in steam plant systems. His work, at times, involved heavy lifting. After leaving the Navy in 1974, he continued

his work as a mechanic/machinist with the United Nuclear Corporation making components for nuclear ships until 1979. In 1979, Mr. Ilgenfritz was employed by Electric Boat and specialized in testing nuclear submarine systems. After four years with Electric Boat, Mr. Ilgenfritz started college courses and held numerous part-time jobs as a steam plant mechanic at a hospital and as an accounting temporary employee. He earned an accounting college degree in 1989 and continued his part-time work. Up through 1989, Mr. Ilgenfritz did not encounter any problems with his shoulders. (TR, pages 66 to 77).

Mr. Ilgenfritz was hired as boiler plant equipment mechanic, Wage Grade 10, at the USCGA in April 1991. As an employee of the USCGA, Mr. Ilgenfritz was able to participate in the federal insurance and retirement plans. He also had access to USCGA facilities, such as the gym, and activities. Shortly after Mr. Ilgenfritz was hired, Mr. Eugene Bergeron became his supervisor. In turn, Mr. James Simmons supervised Mr. Bergeron. And, Mr. Simmons reported to the Public Works Officer. Mr. Ilgenfritz's co-workers were four steam plant operators, including Mr. David Piermattei and one other boiler plant mechanic, Mr. Patrick Williams. The boiler plant position description (CX 7) accurately reflected his duties when he started working as a mechanic. His general responsibilities were repair and maintenance of the boilers, associated equipment, and the steam distribution system (most of this system was underground). Mr. Ilgenfritz also stood periodic watch as a steam plant operator. As an operator, Mr. Ilgenfritz ensured the boilers remained operational. The boiler plant generated steam twenty-four hours a day, year round. The position description (CX 7) does not identify hazardous material duty. As time passed, Mr. Ilgenfritz became more involved in administrative duties. Eventually in 1993, about the time the Superintendent of the USCGA stressed to all personnel the importance of controlling hazardous waste material, Mr. Ilgenfritz was assigned hazardous waste duty. (TR, pages 78 to 95).

The steam plant consists of a boiler room, a kitchen, bathroom, and a tool room. When Mr. Ilgenfritz started at the USCGA, the tool room contained a desk that was used by plant personnel. The watch station desk with a phone was located in the boiler room. However, due to the plant's noise level, the watch phone was difficult to use. Generally, the employees were free to move around the plant. (TR, pages 95 to 100).

Starting in January 1992, Mr. Bergeron assigned Mr. Ilgenfritz to administrative tasks, including supply and special projects. Eventually, the division of Mr. Ilgenfritz's time was 80% administrative and 20% mechanical. Mr. Ilgenfritz received an overall "proficient" rating his first and second years at the plant and received performance awards. Then in 1993, following the superintendent's hazardous waste briefing, Mr. Bergeron assigned Mr. Ilgenfritz as the Hazardous Materials Coordinator (HMC) and Mr. Ilgenfritz received training in hazardous materials. Mr. Ilgenfritz believed he would remain the plant HMC to get the program up and running. Mr. Bergeron did not indicate the position would be rotated among employees. However, in December 1993, Mr. Williams became the HMC for a while, with Mr. Ilgenfritz serving as an assistant. Mr. Bergeron appeared concerned about the amount of time Mr. Ilgenfritz was spending as the HMC. Yet, as the steam plant's first HMC, Mr. Ilgenfritz had to spend most of his time developing an environmental compliance plan for the control of hazardous materials, even though his position description did not actually include hazardous material duty. He identified and inventoried the

plant's hazardous material and worked with the USCGA Hazardous Materials Officer. Initially, when Mr. Ilgenfritz expressed a concern that he was devoting so much time to the HMC duty, Mr. Bergeron re-assured Mr. Ilgenfritz and told him HMC was a priority. Mr. Ilgenfritz perceived resistance among his co-workers to the hazardous waste materials program because it was new. As an example, sometime in 1994, someone wrote an obscenity into the hazardous waste log book maintained by Mr. Ilgenfritz. Mr. Bergeron's support of the program was neutral. As another example, in November 1994, when Mr. Ilgenfritz made a safety suggestion to Mr. Bergeron concerning work in the confined underground tunnels, Mr. Bergeron became irritated and made an inappropriate remark. Eventually, Mr. Ilgenfritz wrote memos to Mr. Bergeron specifically requesting his support. Working as an HMC, Mr. Ilgenfritz used manuals, the telephone, and computer programs. In particular, the computer was useful for a spreadsheet program and e-mail messages to Mr. Bergeron and the Environmental Section of the USCGA. Around that time, Mr. Berkman worked in the Environmental Section. In the 1993 to 1994 appraisal, Mr. Bergeron rated Mr. Ilgenfritz as overall "proficient" and praised him for superb work in the hazardous materials area. (TR pages 101 to 125, and 133 to 139).

In mid-1994, Mr. Ilgenfritz resumed primary responsibility as the plant HMC when he received an appointment letter. He acknowledges that Mr. Bergeron was influential in the appointment. No one told him the appointment was permanent. By late 1994, to facilitate his work as the HMC, Mr. Ilgenfritz set up a work station on the desk located in the tool room. He used a phone that was also located in the area. In addition, Mr. Ilgenfritz used a computer in Mr. Bergeron's office to record hazardous materials information and access the e-mail system, using his own account, name, and password. During this time Mr. Ilgenfritz was experiencing communications difficulties with Mr. Bergeron concerning his hazardous materials duties (CX 16). As a result, Mr. Ilgenfritz sent Mr. Bergeron an e-mail message in February 1995 expressing a desire to improve communications (CX 17 and 18). Then, in March 1995, an inspection of the boiler plant by environment personnel identified sand from the grit blaster as a hazardous waste (CX 19). Their inspection report, which mentioned the grit blaster sand was sent to Mr. Bergeron. Subsequently, Mr. Ilgenfritz kept a log of hazardous materials that needed to be shipped out, including five gallons containers of grit, which had been contaminated by paint in a grit blaster. The grit was hazardous material and the Environment Section would arrange for its disposal. The grit blaster itself was not labeled as hazardous material. Instead, it was identified as part of a hazardous waste stream. Mr. Ilgenfritz's performance rating for 1994 to 1995 was overall "proficient" with favorable comments about his HMC work. (TR pages 129 to 133, 143 to 154, 186 to 189, 383 to 384, and 454 to 458).

In June 1995, Mr. Ilgenfritz received a formal letter appointing him the boiler plant HMC (CX 21). Mr. Ilgenfritz was now spending 30 to 50% of his time as HMC and used an additional 20% of his time as a mechanic. He devoted the remaining portion of the work day to administrative duties. Also, in 1995, Mr. Ilgenfritz started having problem with shoulder pain following strenuous work. He informed Mr. Bergeron of the treatment he received for the sore shoulder. In October 1995, after attempts to contain the grit sand from escaping the grit blaster during use, Mr. Bergeron decided to get rid of the machine. The grit blaster was a chamber with nozzles that directed grit sand under pressure at an object to strip it of paint. Mr. Ilgenfritz decided the best way

to dispose of the grit blaster was through supply channels, DRMO, so that it might be recycled. He informed Chief Colton, the USCGA Property Officer, that several items in the plant were ready for disposal, including the grit blaster (CX 23). Mr. Ilgenfritz expected the property personnel would eventually remove the grit blaster and he would then inform them that the grit blaster was contaminated. He did not mention to Chief Colton that the grit blaster had been used with hazardous materials. In response to Mr. Bergeron's inquiry, Mr. Ilgenfritz told him that he had cleaned out the grit blaster. Even though the grit blaster was taken out of service at that time, it remained in the boiler plant area. (TR pages 132 to 133, 154 to 165, and 392 to 396).

In the morning of October 23, 1995, Mr. Ilgenfritz overheard two steam plant employees discussing a fuel leak from an emergency generator fuel tank. Apparently, a float switch in the tank stuck and caused some fuel to spill out onto the ground. The two individuals believed only a few gallons of fuel oil had leaked, but after examining the site of the spill, Mr. Ilgenfritz estimated about twenty-five gallons. There was no contamination of the air or any water from the spill. Mr. Ilgenfritz was frustrated about the incident because no one had contacted him. Mr. Ilgenfritz believed that as an HMC he had a legal responsibility for hazardous waste spills. Mr. Ilgenfritz and the other two individuals reported the spill to Mr. Bergeron. At that time, Mr. Ilgenfritz expressed his opinion that the USCGA Hazardous Materials Officer needed to be notified. Mr. Bergeron indicated he would take care of the notification. On the same day, Mr. Ilgenfritz notified by e-mail LT (jg) Opstrup, the USCGA Hazardous Materials Officer, of the twenty-five gallon oil spill (CX 26). Two days later, in the morning of October 25, 1995, Mr. Bergeron called Mr. Ilgenfritz at home asking him when he had reported the oil spill to the Hazardous Materials Officer. When Mr. Ilgenfritz arrived at work that morning, Mr. Bergeron seemed angry and yelled at Mr. Ilgenfritz, telling him that reports about oil spills to the environmental officer were to be accomplished in person or by phone. Mr. Ilgenfritz believes Mr. Bergeron may not have reported the spill and was angry because one of Mr. Ilgenfritz's memos had notified some one about it. He directed Mr. Ilgenfritz to record all the events concerning the oil spill. (CX 28). Apparently, Lt (jg) Opstrup had been away and did not receive Mr. Ilgenfritz's e-mail about the spill. Also, in the morning, a contractor arrived to assess the oil spill. Later that afternoon, Mr. Ilgenfritz heard Mr. Berkman in the Engineering Office asking Mr. Bergeron whether he wanted a contractor to clean up the oil spill. Mr. Bergeron replied affirmatively. Eventually, a contractor cleaned up the oil spill site so there was no violation of the law. (TR pages 125 to 129, 165 to 184, 401 to 406, and 453 to 454).

At the end of 1995, Mr. Ilgenfritz received a Letter of Appreciation for his work as HMC (CX 33). However, due to the resistance and increasing lack of cooperation at the plant, Mr. Ilgenfritz did not feel satisfied with the environmental program. Based on Mr. Bergeron's statement about the steam plant family, Mr. Ilgenfritz felt he was being asked to keep environmental issues within the steam plant family. When Mr. Bergeron denied Mr. Ilgenfritz's leave request for January 1996 (CX 34), he interpreted the denial as a repercussion for making waves. Mr. Ilgenfritz didn't know anyone else who had ever been denied leave prior to January 1996. Mr. Bergeron rated Mr. Ilgenfritz "proficient" for the appraisal period April 1995 through March 1996 (CX 47). During this appraisal period, Mr. Ilgenfritz spent 60% of his work day on HMC work. (TR pages 189 to 197, and 258 to 263).

In March 1996, Mr. Ilgenfritz contacted Chief Colton again about the removal of the equipment ready for disposal, including the grit blaster. In May 1996, Mr. Bergeron asked Mr. Ilgenfritz about removal of the grit blaster and Mr. Ilgenfritz again contacted Chief Colton. However, it took a presidential visit to finally remove the grit blaster. In preparation for President Clinton's participation in the USCGA graduation, a general clean-up was ordered. Mr. Bergeron directed Mr. Ilgenfritz and Mr. Williams to remove the grit blaster and the other items waiting for property disposal and to throw the junk in a large dumpster. When Mr. Ilgenfritz started to object to throwing away the grit blaster, Mr. Bergeron cut him off. The subject wasn't open for discussion. But, Mr. Ilgenfritz believed their actions constituted an illegal disposal of government property. In addition, because the grit blaster had been identified as part of a waste stream, Mr. Ilgenfritz believed it was improper to simply throw it away. He considered the grit blaster to be contaminated and hazardous. Mr. Bergeron should have known it was hazardous because it had generated hazardous waste. On the same day, he e-mailed Chief Colton and advised him that the grit blaster had been thrown away. This led to an inquiry. He also informed the Environmental Section of the disposal of the grit blaster, but there was no apparent follow-up. In addition, Mr. Ilgenfritz reported the incident to the Fraud, Waste, and Abuse hotline. This last report generated an investigation into the disposal of the grit machine conducted by CWO Eybel. During the course of the investigation, CWO Eybel interviewed Mr. Bergeron about the disposal of the grit blaster. CWO Eybel also interviewed Mr. Ilgenfritz who told him the grit blaster had been part of a waste stream. Mr. Ilgenfritz did not call it hazardous waste. Because of his interview with CWO Eybel and the fact CWO Eybel also talked to Mr. Bergeron, Mr. Ilgenfritz believes Mr. Bergeron knew he had reported the dumping of the grit blaster to Chief Colton and the Environmental Section. Mr. Ilgenfritz also prepared a summary of the events which demonstrated the deteriorating work place environment and sent it to a person named "Len" who had investigated his disposal of government property complaint (CX 45). In his summary, Mr. Ilgenfritz did not mention the contaminated nature of the grit blaster because he was concerned about potential criminal and financial liability for helping to dispose of the machine improperly. (TR pages 198 to 210, 274 to 282, and 398 to 401).

Around June or July of 1996, Mr. Ilgenfritz observed a co-worker chipping paint off a Coast Guard emblem that was painted on the side of the plant. Due to the richness of the paint's color, Mr. Ilgenfritz suspected the paint contained heavy metal. So, Mr. Ilgenfritz called LT (jg) Opstrup in the Environmental Section and suggested he come down and evaluate the situation. Although Mr. Ilgenfritz also told Mr. Bergeron that the paint was being removed from the wall, he did not mention his call to LT (jg) Opstrup. Eventually, the paint chips tested positive for cadmium and the area was cleaned up. Later, in the summer of 1996, a person from the Environmental Section observed another boiler plant worker chipping paint in the plant kitchen. These paint chips also eventually tested positive for heavy metal. However, Mr. Ilgenfritz did not observe this incident or make a complaint about it. Finally, sometime in the summer of 1996, Mr. Ilgenfritz also raised an issue with personnel in the Environmental Section on whether there might be asbestos material in the boiler plant (CX 44). (TR pages 210 to 217, and 243 to 248).

Shortly after the grit blaster and paint chip incidents, Mr. Ilgenfritz came into work one day and found the desk and the phone in the tool room were gone. His material that had been on the desk was piled on a work bench. No one had told him there was a problem with his use of the desk

and phone. Sometime later, Mr. Ilgenfritz learned that Mr. Simmons may have directed Mr. Bergeron to remove the desk and phone. Around this same time, Mr. Bergeron explained Mr. Ilgenfritz needed to concentrate more on his mechanic duties and less on his HMC work. Then, in the summer of 1996, Mr. Ilgenfritz broke an old microwave oven when he tried to use the operating panel. He pressed too hard and fractured the glass. Later, Mr. Bergeron informed Mr. Ilgenfritz that he had received a complaint about the damaged oven. And, during a second meeting, Mr. Bergeron asked Mr. Ilgenfritz to make restitution. Mr. Bergeron then wrote a memo about the damaged oven (CX 36). Mr. Ilgenfritz bought a used microwave as a replacement. After a short period of time, the government ordered a replacement microwave. Mr. Ilgenfritz felt the incident of the damaged microwave was blown out of proportion and that he was under pressure. Finally, contemporaneous with these events, Mr. Ilgenfritz's ability to accomplish his HMC duties were further restricted because the password to Mr. Bergeron's computer was changed and for a while, Mr. Bergeron locked his office door. Mr. Ilgenfritz chose not to confront Mr. Bergeron about the changed password. Instead, Mr. Ilgenfritz used a computer located in another area. Mr. Ilgenfritz sent e-mails in July 1996 to Mr. Bergeron expressing his concern that his loss of computer access in Mr. Bergeron's office hindered his ability to perform HMC duties, which he now believed were almost a full time job, consuming at least 80% of his time (CX 41 and 43). Mr. Ilgenfritz also submitted a grievance concerning the events of the preceding few months (CX 42). The union steward interviewed Mr. Bergeron who stated Mr. Ilgenfritz had a short fuse. At that point, Mr. Ilgenfritz became discouraged with the whole process and didn't pursue the matter. Around July 1996, Mr. Ilgenfritz received another treatment for his painful shoulders. And, in mid-July 1996, Mr. Bergeron denied his request for overtime pay (CX 46). Mr. Bergeron also informed him of a job opportunity in another part of the Academy. Mr. Ilgenfritz interpreted this information as a Mr. Bergeron's way of saying here's an opportunity to leave, get out of here. Another day, Mr. Ilgenfritz found a sign on a computer with a derogatory comment. He doesn't know who wrote it. In early August 1996, Mr. Bergeron removed HMC duties from Mr. Ilgenfritz and assigned them to Mr. Hancock (CX 52). Mr. Bergeron stated the purpose of the re-assignment was to rotate the HMC duties among the plant workers. But, up to that time, Mr. Ilgenfritz had never heard of such a policy. Instead, he believed the action was a demotion even though there was no change in his pay. In the fall of 1996, Mr. Ilgenfritz produced an outline for improving communications in the boiler plant which was reviewed and considered up the chain of command to the Public Works Officer but there was little response (CX 55). After he lost his HMC duties, Mr. Ilgenfritz returned to essentially boiler plant mechanic work and performed the same tasks as Mr. Williams, the other plant mechanic. At the same time, the pain in Mr. Ilgenfritz's shoulders increased. He informed Mr. Bergeron about his shoulder problems a couple of times. On one occasion in September 1996, Mr. Bergeron designated Mr. Ilgenfritz as the acting plant supervisor. (TR pages 215 to 217, 220 to 242, 248 to 258, 284 to 297, 380 to 381, 407 to 409, 422, and 460 to 461).

While Mr. Ilgenfritz was working a day watch in the late fall 1996, a boiler shut down due to a bad sensor. Mr. Ilgenfritz was unable to re-start the boiler. When he attempted to call for help, no one was available. Eventually, he contacted Mr. Simmons who came down to the plant and went through the procedure with Mr. Ilgenfritz, but the boiler still wouldn't light up. Mr. Simmons then called in Mr. Hancock who quickly reset a switch and started the boiler. Mr. Bergeron's response to this event was to order Mr. Ilgenfritz retrained on the boiler and put on a training watch with Mr.

Hancock. Considering his background and prior training, Mr. Ilgenfritz viewed the additional training requirement as an effort to increase stress on him. He promptly completed the training. But, his shoulder pain began to increase due to the stress and continued mechanical work. By the beginning of 1997, the pain in the shoulders became significantly worse and he began receiving regular medical treatment. Partly due to the pain, Mr. Ilgenfritz started to miss time from work. Eventually, on February 28, 1997, Mr. Ilgenfritz submitted paperwork for worker's compensation. To support his application, Mr. Ilgenfritz prepared a summary of the various tasks he accomplished from 1994 to 1997 that required strenuous labor (CX 60). Although he performed heavy labor at times throughout his employment at the USCGA, the onset his shoulder difficulty was gradual. He did not link the shoulder pain to his work until the beginning of 1997. His doctor recommended light duty, but while Mr. Bergeron assigned him some different tasks, he indicated there was not any light duty at the boiler plant. Mr. Ilgenfritz disagrees with that assessment. He believes he could have stood watch as a boiler operator or returned to the full time work with hazardous materials and supply. Mr. Ilgenfritz acknowledges he performed light duty from February 28, 1997 to April 7, 1997. On April 7, 1997, because he could no longer accomplish the assigned tasks at the plant and believing his application for worker's compensation would be successful, Mr. Ilgenfritz stopped working at the USCGA. Prior to his departure, Mr. Simmons had requested medical documentation on whether Mr. Ilgenfritz had the physical capabilities to perform either mechanic or boiler plant operator duties (RX 1). Mr. Ilgenfritz did not provide the requested documentation. While he was working at the Academy through April 7, 1997, Mr. Ilgenfritz he did not receive a copy of his last performance appraisal which closed on March 31, 1997. Instead, he received the appraisal for April 1996 through March 1997 on October 28, 1998 as part of his retirement package (CX 105). During Mr. Ilgenfritz's visits to the power plant in 1997, Mr. Bergeron never gave him a copy of the appraisal or mentioned it. Although his overall rating was "proficient," the evaluation contained several negative comments. (TR pages 297 to 306, 313 to 327, 347, 375 to 377, and 388 to 389).

After he stopped working at the USCGA, Mr. Ilgenfritz still returned to the plant about once a week to check his mailbox and deliver worker's compensation paperwork to Mr. Bergeron. In June 1997, Mr. Bergeron sent him a letter barring his access to the steam boiler plant (CX 66). Because other people were able to visit the plant, Mr. Ilgenfritz viewed the debarment letter as another punitive action (CX 67). Regardless of the letter, he continued to deliver his paper work to Mr. Bergeron at the plant. During one of these visits in August 1997, Mr. Ilgenfritz discovered that the lock on a tool locker, which he had used exclusively since arriving at the Academy, had been cut off and a tool bag containing government tools was missing. Mr. Bergeron told Mr. Ilgenfritz to keep the tools because he might need them again. Mr. Ilgenfritz reported the missing tools to the police (RX 12) and eventually contacted CDR Brown for the status of the investigation (CX 68). (TR pages 329 to 340, and 412 to 415).

When Mr. Ilgenfritz received the initial notification in the beginning of June 1998 that the USCGA intended to separate him, he was presented with five choices (CX 79). Although one of the options was accommodation, Mr. Ilgenfritz did not select that option because he had been informed previously nothing was available at the USCGA. Instead, he selected disability retirement through the Officer of Personnel Management (OPM) and started processing the application with the help of Ms. Lois Demuth. He is not certain when he actually submitted the package. He also

contacted Ms. Susan O'Leary about the effects of a separation actions on disability retirement. Mr. Ilgenfritz had informed Mr. Hafey of the USCGA that he was submitting his retirement package; however, as of mid-August 1998, he hadn't mailed in the application (CX 84). Part of the necessary paper work was a one page supervisor statement that Mr. Bergeron needed to complete. Mr. Ilgenfritz sent Mr. Bergeron the form, but doesn't recall the date. Even though Mr. Ilgenfritz had started the process of obtaining a disability retirement, he received a notice from Mr. Bergeron on July 1, 1998 indicating an intention to separate him from the USCGA (CX 82). Because Mr. Ilgenfritz had already initiated action for a disability retirement, he did not exercise his right to reply to the proposed notice of separation. In the meantime, Mr. Bergeron still hadn't completed the necessary supervisor statement for the disability retirement. Eventually, Mr. Bergeron sent the document to OPM. On September 3, 1998, Mr. Ilgenfritz received notice from CDR Brown that he had been separated from the USCGA (CX 87). Although the separation action apparently did not adversely affect his disability retirement application, Mr. Ilgenfritz took the separation personally and felt like he was being dismissed. He would have preferred that the USCGA delayed the separation action until a decision had been made on the disability retirement application. (TR pages 341 to 366, and 415 to 428).

Since August of 1997, Mr. Ilgenfritz has struggled with his shoulder pain. Even simple tasks can be difficult. Due to his physical difficulties, Mr. Ilgenfritz has lost his regular income, any pay increases associated with longevity beyond the \$15.15 per hour that he was receiving at the USCGA, and the ability to work towards a federal retirement. He started receiving worker's compensation pay effective April 1997. When Mr. Ilgenfritz completed the separation process at the USCGA, he was very uneasy and felt he was breaking emotional bonds with a comfortable environment. Based on the physical requirements listed in the boiler plant mechanic position description (CX 7), Mr. Ilgenfritz's shoulder condition would prevent him from performing his job as a mechanic. In addition, even the job of boiler plant operator may require strenuous labor. (TR pages 367 to 373, 380, 385).

During his employment at the USCGA, Mr. Ilgenfritz was never denied a pay raise and he never applied for a promotion. In addition to Mr. Ilgenfritz's departure from the boiler plant, a boiler operator named Mr. Herman also left work due to a back injury. As of the hearing date, Mr. Ilgenfritz has not yet accepted his approved disability retirement. Mr. Ilgenfritz has been diagnosed with Lyme disease, which has symptoms including fatigue and major joint pain. His doctor has imposed permanent work restrictions. (TR pages 381, 385 to 386, 425 to 442, and 448).

Father Henri A. Delisle

Father Delisle is a priest who presently resides at a retreat house in Connecticut. He first met Mr. Ilgenfritz in 1996 when he helped change a computer program. At that time, Mr. Ilgenfritz exhibited some difficulty lifting items. However, as 1997 progressed, Mr. Ilgenfritz seemed to have more difficulty with his right side. Mr. Ilgenfritz's pain seemed to get progressively worse into 1998. (TR pages 464 to 468).

Ms. Callista Gingras

Ms. Gingras is Mr. Ilgenfritz's fiancée. She met Mr. Ilgenfritz through their common interest, sailing. When she first knew Mr. Ilgenfritz, he was a very active sailor. He kept sailing through 1995. Around 1995 or 1996, he started having a lot of pain in his shoulders, especially if he raised his arm above his shoulder. Another indication of pain was his refusal to go sailing unless someone on board knew how to handle the boat. He also experiences problems driving. Mr. Ilgenfritz has described the pain as "like a toothache." The pain has also changed his personality. (TR pages 469 to 477).

Mr. Paul D. Berkman
(Rebuttal Witness)

Mr. Berkman worked at the USCGA from 1993 to 1996 as an environmental engineer. He was responsible for environmental compliance at the Academy. He worked for the environmental officer who then reported to the Chief of Construction and Engineering. He met Mr. Ilgenfritz due to Mr. Ilgenfritz's duties as the HMC at the boiler plant. In 1993, the boiler plant had problems with environmental compliance. He was concerned about their disposition of hazardous waste. Mr. Berkman doesn't think there was an automatic rotation policy at the Academy for HMC duty. Mr. Ilgenfritz was one of the more responsible HMCs. Mr. Ilgenfritz was very interested in the HMC work and his ability was at least as good as other Academy HMCs. But, based on Mr. Berkman's inspections of the steam plant, Mr. Ilgenfritz was facing many hindrances. He would find improperly disposed hazardous waste, such as flammable rags. Mr. Ilgenfritz did a good job as HMC. He was conscientious and would not willingly throw out hazardous waste. (TR pages 797 to 808, and 816 to 819).

Mr. Berkman was aware that the grit blaster produced hazardous waste. Mr. Ilgenfritz reported to Mr. Berkman that the grit blaster had been thrown out. Mr. Berkman then informed his supervisor. He received no response about the grit blaster. Mr. Berkman was also aware that Mr. Ilgenfritz's desk had been removed. And later, Mr. Ilgenfritz complained to him about the loss of computer access, the desk, and the phone. He said Mr. Bergeron ordered it moved. Essentially, Mr. Ilgenfritz did not believe he could perform his HMC duties without a workstation, computer, and phone. Mr. Ilgenfritz did not inform Mr. Berkman he still had access to a computer in the sail loft. (TR pages 810 to 815, and 818 to 819).

Summary of Testimony - for the Respondent

Mr. James Simmons

Mr. Simmons is presently the Chief of Utilities and Public Works at the USCGA. Part of his responsibilities includes supervision of the boiler plant. He was Mr. Ilgenfritz's second level supervisor and directly supervised Mr. Bergeron, who was Mr. Ilgenfritz's immediate supervisor. Mr. Simmons first met Mr. Ilgenfritz in 1992 or 1993. An HMC is assigned in each shop at the USCGA in an effort to reduce hazardous materials waste. The supervisor of each shop has authority

to select the HMC. Mr. Bergeron exercised that authority and selected Mr. Ilgenfritz as HMC for the boiler plant. Mr. Simmons is not sure how long Mr. Ilgenfritz served as an HMC. Mr. Bergeron did express an intention to rotate the collateral duty of HMC among employees because it was not the most desirable duty. (TR pages 492 to 499).

During one clean up day at the Academy, several dumpsters were rented to permit the removal of trash. At the time, they were having difficulty getting rid of property through DRMO. Mr. Bergeron in particular indicated he had all the necessary paper work completed for a grit blaster, but no one would pick it up. Mr. Simmons decided to bypass the standard procedures and told Mr. Bergeron to throw the grit blaster into the dumpster. Mr. Bergeron asked for permission to throw away the grit blaster and Mr. Simmons gave it to him. Mr. Bergeron told him it was clean. Subsequently, Mr. Simmons received a call from CWO Eybel about inappropriate disposal of the property. Mr. Ilgenfritz had registered a complaint about Mr. Bergeron throwing away the grit blaster. Mr. Simmons explained that it was his decision to throw out the grit blaster and he told Mr. Bergeron to let Mr. Ilgenfritz know that he made the choice and not Mr. Bergeron. Mr. Simmons doesn't know whether that information was relayed to Mr. Ilgenfritz. Mr. Simmons was not contacted by environmental personnel concerning the grit blaster. (TR pages 499 to 505, 526 to 527, and 534).

During a few visits to the boiler plant, Mr. Simmons noticed several workers "lounging" around a desk and a phone set up in the tool room. As a result, he told Mr. Bergeron to remove the desk and phone. He pointed out that the employees still had access to the watch desk and phone. Mr. Simmons was not aware that any particular employee used the desk. His decision to remove the desk and phone was not a subject for discussion. Mr. Bergeron informed him that people used the desk; he didn't mention Mr. Ilgenfritz in particular. Mr. Bergeron eventually followed Mr. Simmons' instructions. (TR page 506 to 510, and 528).

In the fall of 1996, Mr. Simmons was present when Mr. Ilgenfritz had a problem restarting a boiler. An electrician and Mr. Ilgenfritz were not able to resolve the problem. Then, Mr. Hancock arrived and in a short time corrected the problem and started the boiler. Mr. Simmons became concerned because the difficulty seemed readily apparent to Mr. Hancock but Mr. Ilgenfritz, who had watch duty at the time, couldn't fix it. So, he told Mr. Bergeron that he wanted Mr. Ilgenfritz retrained on watch standing procedures. Mr. Bergeron didn't object; but, he didn't think it was that serious. Mr. Bergeron was also concerned about moving Mr. Ilgenfritz to the night shift. His best trainer was Mr. Hancock, who worked nights. Mr. Simmons made the decision that training was necessary; he permitted Mr. Bergeron to determine how the training would be accomplished. Mr. Simmons was not aware of any other watch standers who had not been able to restart a boiler. (TR page 510 to 515, and 528 to 530).

Mr. Simmons first became aware of Mr. Ilgenfritz's shoulder problems about a year before he left the Academy. Mr. Ilgenfritz was having problems raising his arms and eventually he could no longer work. After Mr. Ilgenfritz departed, another employee at the boiler plant, Mr. Herman, also went out. Because the steam plant work force was down by two persons, they hired temporary employees. After Mr. Ilgenfritz's doctor determined he would not be able to return to work as a

mechanic at the boiler plant, they started the process of placing Mr. Ilgenfritz on the worker's compensation program and obtaining a replacement permanent employee. He worked closely with Mr. Mary Hafey to ensure all the appropriate personnel procedures were followed. Mr. Simmons wanted Mr. Ilgenfritz transferred quickly to the U.S. Department of Labor for compensation so he could promptly fill his position with a permanent employee and start necessary training. Permanent employees are preferable since they have many incentives to stay in the job as opposed to temporary employees who are hired for only six months. After a required one year waiting period, Mr. Simmons pushed for the quick replacement of Mr. Ilgenfritz. He also took the same approach in replacing Mr. Herman who was totally disabled. He initiated the paperwork to replace both employees in the same manner. Mr. Simmons did not perceive the action as a "firing." Instead, he viewed the situation as a transfer of Mr. Ilgenfritz from the USCGA to the U.S. Department of Labor. He knew Mr. Ilgenfritz was planning to pursue a disability retirement and he believes they withheld the separation action to permit him to submit the retirement application. (TR pages 515 to 521, and 540 to 542).

Mr. Simmons did meet with Mr. Bergeron and Mr. Ilgenfritz to discuss Mr. Ilgenfritz's concerns about Mr. Bergeron. They discussed communications. Mr. Ilgenfritz did not allege any retaliation. Mr. Ilgenfritz was hired as a mechanic and his principal work was as a mechanic. His assignment to HMC duties was not a promotion, it was a collateral duty. Mr. Simmons played no role in Mr. Bergeron's decision to remove HMC duties from Mr. Ilgenfritz. Mr. Simmons never retaliated or discriminated against Mr. Ilgenfritz for duty as HMC. Likewise, he never directed anyone to take such action. Mr. Simmons believes Mr. Ilgenfritz did a good job as HMC. (TR pages 521 to 524, and 532).

Mr. Simmons was aware of an oil spill at the steam plant emergency generator. He knows a contractor cleaned up the spill. He doesn't know who reported the spill. Mr. Simmons did not know about the paint chips on the ground by the boiler plant building. (TR pages 535 to 536).

Mr. Simmons knew Mr. Bergeron intended to keep Mr. Ilgenfritz out of the boiler plant after Mr. Ilgenfritz left on worker's compensation. Mr. Bergeron was concerned that Mr. Ilgenfritz and Mr. Herman would be injured at the plant due to its rehabilitation. Mr. Bergeron also objected to serving as a mail carrier. So, Mr. Simmons approved Mr. Bergeron's request. (TR pages 542 to 543).

LCDR George Stephanos

LCDR Stephanos is the Chief of Public Works at the USCGA. He works for CDR Brown and supervises Mr. Simmons. Lcdr Stephanos arrived at the USCGA in July 1997 and knows Mr. Ilgenfritz. He first spoke to Mr. Ilgenfritz after an investigation into a cut lock indicated everything seemed in order. The HMC job is a collateral duty in every shop and rotated among employees. Although Mr. Simmons and Mr. Bergeron did the paper work, Lcdr Stephanos was the "driving force" behind the effort to replace Mr. Ilgenfritz and the other employee who was unable to work. Both positions in the boiler plant had been open for a long time. When he discovered that neither employee would be returning, Lcdr Stephanos strived to get the positions filled permanently. He

consulted with Ms. Hafey and had Mr. Simmons work on the separation actions. In discussions with CDR Brown and Mr. Bergeron concerning the separation, the only stated basis for the action was Mr. Ilgenfritz's physical inability to perform his job. They followed the same separation procedures with Mr. Ilgenfritz and Mr. Herman. LCDR Stephanos became frustrated with the process because it appeared they were taking extra steps in the process. He believes Mr. Ilgenfritz was on disability compensation as of March 1997. Mr. Ilgenfritz never complained about alleged acts of retaliation. LCDR Stephanos recommended to CDR Brown that he sign the final decision letter separating Mr. Ilgenfritz. LCDR Stephanos was not unaware of any HMC activities of Mr. Ilgenfritz at the plant until the present complaints were filed. LCDR Stephanos denies taking any retaliatory action against Mr. Ilgenfritz. Mr. Bergeron did share on some occasions that he was unhappy with Mr. Ilgenfritz's duty performance. Prior to the complaints, LCDR Stephanos did not know about the oil spill, grit blaster, or paint chips. (TR pages 547 to 564).

Ms. Mary E. Hafey

Ms. Hafey is the command staff advisor for the Coast Guard Personnel Command. She is stationed at the USCGA. She served as a personnel advisor to the supervisors who participated in Mr. Ilgenfritz's separation action. The supervisors were Mr. Bergeron, Mr. Simmons, LCDR Stephanos, and CDR Brown. During the same period that Mr. Ilgenfritz was being separated, these supervisors also took separation action against Mr. Herman, another injured employee. Both employees had been on leave without pay status for over a year. If after a year an employee has not recovered sufficiently to return to work, a supervisor may remove the employee and hire another permanent worker. The sole motivation for Mr. Ilgenfritz's removal was the need to fill his position permanently and the doctor's opinion that Mr. Ilgenfritz was not improving sufficiently to return to work in the position. (TR pages 570 to 578).

Ms. Hafey does a quality review of employee performance appraisals for the USCGA. A proficient rating means a good employee who is satisfactorily meeting his or her job requirements. (TR pages 579 to 584).

She talked to Mr. Ilgenfritz about the options he had concerning the proposed separation action. During their discussions, Mr. Ilgenfritz never alleged he was harassed for protected environmental activities. He did believe Mr. Bergeron was treating him unfairly. In particular, he objected to Mr. Bergeron's use of certified mail for correspondence to Mr. Ilgenfritz. Ms. Hafey explained that many personnel documents are routinely sent certified mail. Mr. Ilgenfritz also complained that Mr. Bergeron was giving him a difficult time on worker's compensation and not completing the necessary forms quickly. Mr. Bergeron does not have strong administrative skills. A supervisor is expected to take timely administrative action and to possess communication skills. Ms. Hafey never retaliated against Mr. Ilgenfritz for anything. She did have Mr. Ilgenfritz contact Ms. Lois Demuth at the Coast Guard headquarters in Washington, DC about retirement questions. (TR pages 584 to 600, and 605).

Because Mr. Herman suffered from a degenerative back problem, there was no job available for him at the steam plant. In Mr. Ilgenfritz's case, he had been placed on light duty for awhile.

Later, the supervisors considered whether he could work other jobs. But, work at the plant required climbing ladders, bending down, and pulling objects. Because the doctors said Mr. Ilgenfritz could not do any work above shoulder height, he could not perform the necessary physical tasks. (TR pages 600 to 604).

In the performance appraisal cycle, a supervisor first provides a performance plan for an employee to follow. There is a performance review half way through the annual cycle. If an employee is having problems, a supervisor should explain the situation, indicate any necessary training, and help the employee to improve performance. At the end of the cycle, the supervisor rates the employee based on the performance standards. Then, the second level supervisor reviews and signs the evaluation. The evaluation is then presented to the employee who is suppose to sign it. Mr. Ilgenfritz did not sign three such appraisals (CX 13, 20, 104/105). About a third of all employees at the academy receive a “proficient” rating. If a supervisor intends to put a negative comment in a rating, he or her should have already discussed it with the employee. It is the supervisor’s responsibility to ensure the employee receives the completed appraisal at the end for the reporting cycle. (TR pages 606 to 621, 628, and 633 to 634).

Concerning accommodation, Ms. Hafey indicated Mr. Ilgenfritz might have been able to accomplish some administrative tasks, but no positions were open at the Academy due to low turnover. She discussed accommodation with Mr. Simmons and CDR Brown. But, other than making up a new job, such as shelving books at the library, there was nothing available for him. A representative from the U.S. Department of Labor stated if that Mr. Ilgenfritz was in that type of job, they would not continue to authorize re-training. Based on his other skills and education, Mr. Ilgenfritz might be able to pursue a different type of work. (TR pages 621 to 624).

CDR Eric Brown

Commander Brown is the Chief of the Facilities Engineering Division at the USCGA. He is the fourth level supervisor of Mr. Ilgenfritz. Prior to that time, he served as Chief of Public Works Branch from August 1995 to June 1997. One of his responsibilities included compliance with environmental laws. Mr. Ilgenfritz was a boiler plant mechanic within the Public Works Branch. Mr. Ilgenfritz performed a number of collateral duties including administration and HMC. The removal action was initiated by LCDR Stephanos in an effort to fill the position in the boiler plant with a permanent employee. A permanent worker is preferable because supervisors can invest more time and money on training. CDR Brown reviewed the separation paper work prepared by LCDR Stephanos and signed the final decision letter. Prior to signing the decision letter, CDR Brown was not aware that Mr. Ilgenfritz was submitting a disability retirement package. Mr. Ilgenfritz’s removal had nothing to do with his environmental activities. CDR Brown was not angry at Mr. Ilgenfritz. Likewise, no one in his chain of command has expressed anger towards Mr. Ilgenfritz for his environmental actions. CDR Brown became aware of Mr. Ilgenfritz’s alleged environmental protected activities in October 1998. (TR pages 637 to 643, 648 to 649, 672 to 674, and 680).

In the October of 1996, CDR Brown received a list of suggested improvements on

supervision issues from Mr. Ilgenfritz. CDR Brown had a meeting with Mr. Ilgenfritz and Mr. Bergeron. As CDR Brown recalls, all the parties, including Mr. Ilgenfritz, agreed the best course of action was for Mr. Ilgenfritz to return to his mechanic duties. Mr. Ilgenfritz had also complained about the disposal of the grit blaster. He did not mention any environmental aspect; instead, Mr. Ilgenfritz was concerned about the fraud and abuse associated with the disposal of government property. He did not discuss an oil spill but did raise the issue of paint chips. They also discussed the microwave oven incident and the communications problem at the plant. This meeting lasted over an hour. Mr. Ilgenfritz never raised any issue regarding retaliation with CDR Brown. CDR Brown took notes of the meeting and typed a summary (CX 118 and 119). CDR Brown determined that Mr. Bergeron and Mr. Ilgenfritz did not always agree with each other. (TR pages 643 to 648, and 651 to 656).

Mr. Eugene A. Bergeron

Mr. Bergeron is the supervisor of the steam plant at the USCGA and started work there in April 1991. At present there are six employees at the plant: one mechanic and five boiler operators. The mechanic is responsible for major and minor repairs of the boiler and corresponding equipment. The operators ensure the safe operation of the boiler with routine checks and minor repairs. The present mix of one mechanic and five operators is optimum because it permits reduces the number of night watches an individual operator has to pull. Instead of two mechanics, the operators serve as a helper during the day for the one mechanic. Operators need physical stamina and skills because the job requires the ability to climb ladders and work in confined spaces. An operator also needs to be able to lift at least fifty pounds. (TR pages 682 to 688).

Mr. Bergeron met Mr. Ilgenfritz in the summer of 1991. He was a boiler plant mechanic and also possessed good administrative skills. During the first two years, Mr. Ilgenfritz spent about half his time as a mechanic and the other half performing administrative functions, such as supply. The other plant mechanic, Mr. Williams, spent all his time as a mechanic or operator. By 1992 or 1993, the Academy started a hazardous waste program to identify waste streams and control hazardous waste. Part of the reason for the increased emphasis was an inspection by the state of Connecticut. Mr. Bergeron selected Mr. Ilgenfritz as the first HMC²⁰ and Mr. Ilgenfritz received training in hazardous waste management. Mr. Bergeron did not relieve Mr. Ilgenfritz of his mechanic duties. He considered HMC a collateral duty. At first, to get the program started, a lot of time was required. Now, being a HMC requires less time. Mr. Ilgenfritz worked as the plant HMC for about two years. He did a good job as HMC. Around 1994, he gave the HMC duty to another employee in an effort to get other employees up to speed. (TR pages 689 to 699, and 756 to 757).

The grit blaster was a machine that contained a chamber for sandblasting items. Because it generated hazardous waste and was designated part of a waste stream, Mr. Bergeron decided to get the grit blaster out of the plant. The required paper work to turn the grit blaster into salvage was completed. The grit blaster was cleaned out and stripped down. The vacuum bags were removed

²⁰Mr. Bergeron used the term HWC for Hazardous Waste Coordinator.

and the air piping disconnected. Mr. Bergeron attempted to transfer the equipment to other shops but nobody wanted it. Eventually, the grit blaster laid around at the plant for a year until a clean up day for a presidential visit. As part of that effort, Mr. Bergeron's boss told him to get rid of the grit blaster, so he did with the help of Mr. Ilgenfritz and Mr. Williams. There was no sand in the blaster when it was thrown into the dumpster. The grit blaster was not contaminated. Sometime after Mr. Bergeron threw away the grit blaster CWO Eybel contacted him about the disposal. CWO Eybel informed Mr. Bergeron that Mr. Ilgenfritz had initiated the inquiry. He was not particularly upset about the inquiry because he had simply been following orders. The grit blaster incident had nothing to do with Mr. Ilgenfritz's removal from HMC duty. He was happy the grit blaster was gone. Mr. Bergeron expects his employees to follow his order unless there is something wrong with it. On the other hand, Mr. Bergeron follows the orders of his supervisors whether they are right or wrong. (TR pages 699 to 704, 752 to 753, 757 to 760, and 775 to 776).

When a float became stuck in a small twenty-five gallon fuel oil tank, oil spilled out of the tank. Mr. Williams told him about the spill and Mr. Bergeron contacted the necessary person to have the spill cleaned up. Mr. Bergeron did not consider it an emergency since the sand on the ground had absorbed the fuel oil. The report of the oil spill probably came from Mr. Bergeron. Mr. Ilgenfritz knew about the spill, but Mr. Bergeron does not remember discussing how the spill information should be passed on to the environmental section. He didn't confront Mr. Ilgenfritz about use of the e-mail. Concerning paint chips from the emblem, Mr. Bergeron doesn't remember whether it was hazardous material. He thinks the plant employees just bagged it up. (TR pages 704 to 709, and 778).

Mr. Piermattei filed a complaint with Mr. Bergeron about the broken microwave oven. When he examined the oven, the control panel was "smashed" and the oven was totally destroyed. The microwave oven was used by every watch. When Mr. Bergeron confronted Mr. Ilgenfritz about the oven, he said he pushed it and it broke. Because the incident involved damage to government property, Mr. Bergeron called in security personnel to investigate the matter. Mr. Ilgenfritz brought in a replacement and eventually, Mr. Bergeron purchased another oven. (TR pages 709 to 712).

There was one computer in the boiler plant and it was located in Mr. Bergeron's office. The operators had access to the computer for a program on the boilers. And, Mr. Ilgenfritz, while he was HMC used the computer for an inventory of hazardous waste material. In the summer of 1996 he excluded Mr. Ilgenfritz from using the computer for other than operator duties by changing entry codes for program. Mr. Bergeron was concerned about the personnel information on the computer. So, he restricted its use to the operation of the boilers. Mr. Bergeron only locked his door if contractors were in the plant. He never locked the door to keep Mr. Ilgenfritz out of the office. There use to be three phones in the boiler plant located at the main desk, Mr. Bergeron's office, and the tool room. However, Mr. Simmons ordered the removal of the tool room phone because employee were congregating in the area. Mr. Simmons also directed the removal of a desk in the tool room. He did not indicate the removal was due to Mr. Ilgenfritz's performance as the HMC. Mr. Ilgenfritz had been using the desk more than other employees. Mr. Bergeron did not inform Mr. Simmons of that fact; he just followed Mr. Simmons' orders. (TR pages 712 to 719, 762 to 766, and 780 to 781).

When Mr. Ilgenfritz had been unable to re-light a boiler during his watch, Mr. Simmons had to call in Mr. Hancock, who promptly ignited the boiler. In response, Mr. Simmons directed re-training for Mr. Ilgenfritz. The corrective action that Mr Hancock took to light the boiler was not on the checklist. He was able to solve the problem based on his experience as a boiler operator. (TR pages 719 to 723).

Mr. Bergeron became aware of Mr. Ilgenfritz's shoulder problems in February 1997 right before he went out on worker's compensation. Mr. Bergeron did not offer light duty because none is available in the plant. Use of certified mail for personnel documents was normal procedure. Mr. Bergeron treated the paperwork for both Mr. Ilgenfritz and the other injured employee in the same manner. (TR pages 723 to 726, and 767).

Mr. Bergeron believed rotating the HMC duty would be productive because an operator with HMC experience could better perform HMC work during the night shift. However, there was no written policy. Mr. Bergeron left Mr. Ilgenfritz in the HMC position for a couple of years based on his belief that the start up of the hazardous waste program was intensive. Only after it was established did Mr. Bergeron believe boiler operators could handle the task. After Mr. Ilgenfritz was out on disability, Mr. Bergeron restricted him and Mr. Herman from the plant due to the hazards associated with a major renovation. Only plant employees were permitted in the area during the construction. The incident concerning the cut lock occurred when a pump failed. Mr. Piermattei need some tools to fix the pump. Due to a limited amount of tools, Mr. Williams, without asking permission, cut the lock on the locker and issued the tools to Mr. Piermattei. Mr. Bergeron admonished Mr. Williams for cutting the lock. Although Mr. Williams' intention was good, the act was wrong. (TR page 726 to 730, 757, 769, and 778 to 779).

After Mr. Ilgenfritz and Mr. Herman left, their positions were filled with temporary employees. However, after about a year, Mr. Bergeron told his boss that he needed the positions filled permanently or have Mr. Ilgenfritz come back. Regarding the separation paper work, Mr. Bergeron simply signed and sent Mr. Ilgenfritz documents that had been prepared by someone else (CX 79 and 82). Usually, Mr. Simmons gave him the documents to sign. Mr. Ilgenfritz never discussed the separation action with Mr. Bergeron. Mr. Bergeron was not aware that Mr. Ilgenfritz intended to retire. Mr. Bergeron doesn't specifically recall the supervisor's statement. But, he believes that he would have promptly dealt with any personnel paperwork. Regarding the last performance report, Mr. Bergeron just turned it in after making his appraisal (CX 104). Although he saw Mr. Ilgenfritz after the appraisal, Mr. Bergeron did not mention the performance report. He also did not mail a copy of the report to Mr. Ilgenfritz. Mr. Bergeron's evaluation was accurate and based on Mr. Ilgenfritz's difficulty in completing repairs promptly. He mentioned repair to a boiler sight glass as an example. At the same time, even though that incident occurred early in the reporting period, Mr. Bergeron did not seriously discuss it with Mr. Ilgenfritz at the time. On the appraisal, Mr. Bergeron did compliment Mr. Ilgenfritz on his work with hazardous materials. Finally, Mr. Bergeron included a comment about Mr. Ilgenfritz not interacting with other employees. Again, Mr. Bergeron did not discuss that issue with Mr. Ilgenfritz during the ten months of the cycle when Mr. Ilgenfritz was in the plant. At the time he wrote the last appraisal, Mr. Bergeron expected Mr. Ilgenfritz would be returning to work. Each reporting cycle about four to

five boiler plant employees are rated proficient. Although Mr. Bergeron believed Mr. Ilgenfritz did not like him, Mr. Bergeron had no “hard feelings against Mr. Ilgenfritz.” Early on, Mr. Bergeron did visit Mr. Ilgenfritz for Christmas. Mr. Bergeron always thought “well” of Mr. Ilgenfritz’s HMC work. He did not use the performance report to punish Mr. Ilgenfritz. (TR pages 731 to 749, 771, 773 and 783).

CWO Ernest Eybel, Jr.

Chief Warrant Officer Ernest Eybel, Jr., has been a property officer at the USCGA since 1995. He met Mr. Ilgenfritz in 1996 when they had about a twenty minute discussion. In the spring of 1996, Mr. Ilgenfritz reported the disposal of a grit blaster. Mr. Ilgenfritz was pretty upset about the disposal and made some derogatory remarks about Mr. Bergeron in relation to the work environment. Mr. Ilgenfritz did not express any environmental concern. CWO Eybel discussed the incident with Mr. Bergeron and informed him of the proper procedures. He told Mr. Bergeron to call him if he ever had another government property disposal problem. CWO Eybel indicated that his predecessor, Chief Colton, had a habit of putting off the disposal of government property because he had no place to store the items. CWO Eybel as a property officer does not get involved with the disposal of contaminated property. (TR pages 785 to 795).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

My findings and decision in this case are based on the stipulations of the parties, the testimony at the hearing, and the documents admitted into evidence (CX 1 to 5, CX 7 to 119, and RX 1 to 13). I have also considered the arguments presented by the parties.

Stipulations of Facts

At the hearing, the parties agreed to the following stipulations of fact: (1) Mr. Ilgenfritz’s complaint concerning the separation action was timely and satisfies the time limitations imposed by 29 C.F.R. §24.3 (b); (2) Mr. Ilgenfritz’s request for a hearing regarding the separation action and the hostile work environment were timely within the requirements of 29, C.F.R. §24.4 (d) (2) (TR, pages 39 to 43).²¹

Issue #1 - Timeliness of the Hostile Work Environment Complaint

²¹The parties were not able to stipulate that Mr. Ilgenfritz’s request for a hearing concerning the performance appraisal was timely. The letter from OSHA to Mr. Ilgenfritz dismissing his November 3, 1998 complaint is dated December 18, 1998 (ALJ V). Mr. Sawyer’s fax to the Office of Administrative Law Judges requesting a hearing on the matter, and the transmission confirmation receipt, are dated December 23, 1998 (ALJ VI). Based on these dates and in the absence of contrary evidence, I find Mr. Ilgenfritz’s request for a hearing regarding the performance appraisal was timely within the provisions of 29 C.F.R. §§ 24.4 (d) (2) and (3).

As part of his October 2, 1998 discrimination complaint, Mr. Ilgenfritz alleged that he had been subjected to several hostile acts within his work environment during 1996 and 1997 in retaliation for his environmental disclosures. Mr. Ilgenfritz believes the portion of his complaint about a hostile work environment is timely because the acts in 1996 and 1997 were part of a continuing pattern of discrimination which culminated in a separation action on September 3, 1998.

The respondent asserts the portion of Mr. Ilgenfritz's discrimination complaint relating to a hostile work environment is untimely. The assertion of an untimely complaint is usually considered an affirmative defense. *Hobby v. Georgia Power, Co.*, 90-ERA-30 (Sec'y Aug. 4, 1995).

Principles

Under the statutory employee protection provisions²² and the implementing regulation, 29 C.F.R. § 24.3 (b) (1), a complaint alleging discrimination in violation of employee protection provisions in environmental statutes must be filed²³ within thirty days of the alleged violation. However, the courts and the Secretary of Labor have developed two exceptions to the thirty day filing requirement based on an equitable tolling of the filing requirement and the concept of a continuing violation.

Because only the separation action occurred within the thirty day time period prior to the October 2, 1998 complaint, under the regulations, the complaint is only timely in regards to the separation. Unless either exception to the general rule is established, the portion of the complaint alleging a hostile work environment will be untimely.

Equitable Tolling

Because the thirty day time limit is not jurisdictional, it may be subject to equitable tolling. *Doyle v. Alabama Power Co.*, 87-ERA-43 (Sec'y Sept. 29, 1989), *aff'd sub. nom. Doyle v. Secretary of Labor*, No. 89-7863 (11th Cir. 1989). A tolling of the filing time limitation may be appropriate if: (1) the respondent misled the complainant concerning the cause of action (by fraudulently concealing its actions, see *Hill v. U.S. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995)); (2) some extraordinary circumstance prevented a timely assertion (such as a stroke, see *Central States, Southeast and Southwest Area Pension Fund v. Slotky*, 956 F.2d 1369, 1376 (7th Cir. 1992)); or, (3) the complainant timely raised the precise statutory claim but in the wrong forum. *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).²⁴ In regards to the last

²²See the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (b), and the Solid Waste Disposal Act (Resource Conservation and Recovery Act), 42 U.S.C. § 6971 (b).

²³A complaint is deemed filed on the date of mailing. 29. C.F.R. § 24.3 (b) (1).

²⁴The U.S. Court of Appeals for the Sixth Circuit utilizes a five part test that focuses on lack of actual or constructive knowledge of the filing requirements, diligence, prejudice to the opposing party, and reasonableness of the ignorance of the law; although, ignorance of the law alone is not sufficient to warrant equitable tolling.

basis, the United States Supreme Court has held that utilization of collective bargaining grievance procedures does not justify tolling a statutory filing period. *Electrical Workers v. Robbins & Myers, Inc.* 429 U.S. 229 (1976), cited in *Allentown*, 657 F.2d at 19. In addition, if a complaint is filed in a wrong forum, it still must be accomplished within the required time frame. *Allentown*, 657 F.2d at 20, relying on *Burnett v. New York Central Railroad*, 380 U.S. 424 (1965). On the other hand, equitable tolling is not appropriate because a complaint may not have been aware of the specific time permitted under the statutes for filing a complaint. *Allentown*, 657 F.2d at 21 (ignorance of employee protection provisions of the Toxic Substance Control Act did not toll the filing time limit), and *Kang v. Department of Veterans Affairs Medical Center*, 92-ERA-31 (Sec’y Feb. 14, 1994).

Findings

The first alleged protected activity occurred in October 1995, when Mr. Ilgenfritz reported a twenty-five gallon oil spill to the USCGA environmental office. The alleged retaliatory actions amounting to a hostile work environment (to be discussed in detail in the next section) span from January 1996 when Mr. Ilgenfritz was denied leave by his supervisor through August 1998 when Mr. Bergeron allegedly delayed completion of a supervisor statement. In July 1996, Mr. Ilgenfritz submitted a grievance (CX 45) stating he was being subjected to retaliation in part due to his environment work and at least one act of reporting an environmental concern about paint chips. Then, in October 1996, Mr. Ilgenfritz took his concerns about harassment to LCDR Brown and eventually stated he was considering taking his case of “whistle blowing” to the EEO Officer (CX 55). In the last message to LCDR Brown, Mr. Ilgenfritz sought LCDR Brown’s concurrence with Mr. Ilgenfritz’s intention to see the EEO Officer about his case. After Mr. Ilgenfritz stopped working at the Academy due to his physical difficulties, Mr. Bergeron completed a performance appraisal in May 1997 which included for the first time some areas of performance Mr. Ilgenfritz needed to improve. Mr. Bergeron did not send a copy of this appraisal to Mr. Ilgenfritz. As a result, Mr. Ilgenfritz did not know about his last performance rating until late October 1998. In June 1997, after being denied access to the steam plant, Mr. Ilgenfritz sent Mr. Bergeron a letter alleging that harassment had started right after his report of improperly disposing government equipment (CX 67). Finally, during August 1998, Mr. Ilgenfritz sent paper work to Mr. Bergeron to be completed as part of his disability retirement. Mr. Ilgenfritz alleges Mr. Bergeron intentionally delayed completing the paperwork.

Based on these facts, I find none of the three situations that may warrant a tolling of the statute of limitations applicable in this case. First, it’s clear from his complaints in July 1996, October 1996, and June 1997 that Mr. Ilgenfritz believed he was the victim of harassment and retaliation due to his environmental and “whistle blowing” activities. There is no basis to claim the

Andrew v. Orr, 851 F.2d 146, 151 (6th Cir. 1988). The Secretary has indicated that the *Andrew* analysis should be applied in cases arising in the Sixth Circuit. *Rainey v. Wayne State University*, 89-ERA-8 (Sec’y May 9, 1991). However, Mr. Ilgenfritz’s case arose in the Second Circuit. In cases outside the Sixth Circuit, the Secretary has applied the framework in used by U.S. Court of Appeals for the Third Circuit. See *Doyle v. Alabama Power Co.*, 87-ERA-43 (Sec’y Sept. 29, 1989) [citing *School District of the City of Allentown*, 657 F.2d 16 (3d Cir. 1981)] , *aff’d sub. nom. Doyle V. Secretary of Labor*, No. 89-7863 (11th Cir. 1989).

respondent misled him about a cause of action. The failure of the respondent to present Mr. Ilgenfritz his last appraisal in a timely manner does not alter the analysis because Mr. Ilgenfritz, based on other supervisor actions, had a clear notion about a cause of action. Since he displayed no confusion about a potential cause of action, equitable tolling based on the first situation of being misled does not apply.

Second, Mr. Ilgenfritz has not presented sufficient evidence to demonstrate that extraordinary circumstances precluded a timely filing of a complaint. Mr. Ilgenfritz's shoulder problem did become more significant around the time of the alleged acts of harassment. But, he continued to work through April 1997 at the Academy and there is no evidence his illness was so incapacitating that he could not write or send a discrimination complaint to the appropriate authorities. .

Third, although Mr. Ilgenfritz did place his allegations into the grievance system, according to case law the grievance process is not an alternative forum. Mr. Ilgenfritz also brought his discrimination concerns to the attention of senior supervisors. While Mr. Ilgenfritz may be commended for attempting to resolve his difficulties through his chain of command, I do not believe that process amounts to placing his complaint in a formal adjudicatory forum. LCDR Brown apparently did not respond to Mr. Ilgenfritz's request for concurrence regarding the EEO Officer. But, there is no evidence that LCDR Brown ever interfered with Mr. Ilgenfritz's ability to proceed with his complaint. Mr. Ilgenfritz did not present his complaint about a hostile work environment to the EEO Officer or any forum outside the respondent's organization.

In summary, I find none of the three justifications that may lead to a tolling of the thirty day filing requirement are present. As a result, relief under the concept of equitable tolling is not applicable.

Continuing Violation

A second equitable exception to the thirty day time limit occurs if the complainant is subjected to either a continuing violation or a systematic pattern of discrimination. The justification for this exception is the adverse employment practice becomes apparent only with the passage of time. Paraphrasing the court in *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1991), it would be unreasonable to require a complainant to realize he or she is a victim of discrimination if such discrimination doesn't become apparent until a pattern of discriminatory mistreatment develops.²⁵ If a continuing violation situation exists and the complaint is filed within thirty days of the last act in the continuing series of events, then that one non-time barred act can save the other previous acts which are time barred. *Varnadore v. Secretary of Labor*, Nos. 96-3888/4389 (6th Cir. Apr. 6, 1998) (case below 92-CAA-2 *et al.*)²⁶ In addition, a systematic, or company-wide, pattern

²⁵See also *McCuiston v. Tennessee Valley Authority*, 89-ERA-6 (Sec'y Nov. 13, 1991).

²⁶Even if the last act is not a violation of an environmental employee protection provision, it may still be relevant as to the actor's discriminatory intent which may be probative on the issue of a systematic pattern of

of discrimination may also toll the time limit on the same continuing violation basis. To obtain equitable relief under on this theory, a complainant would have to establish the respondent's policy of discrimination against a group of employees. *Green v. Los Angeles Cty. Superintendent of Sch.*, 883 F.2d 1472, 1480-1481 (9th Cir. 1989).

In considering a continuing violations case, the court in *Berry v. Bd. of Supervisors of LSU*, 715 F.2d 971, 979 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986) noted that the theoretical bases for, and the parameters of, the continuing violation theory are "unclear." However, as a guide, the court presented three questions to be considered in determining whether a series of acts constitute a continuing violation. In subsequent decisions, the Secretary of Labor has adopted this framework. First, are the acts similar in nature, involving the same type of discrimination which tends to connect them together? *Berry*, 715 F.2d at 981. The Secretary has determined that a set of isolated, permanent decisions involving disparate facts, such as non-selection for a position, denial of overtime, and failure to re-assign, does not amount to a continuing violation. *Gillian v. Tennessee Valley Authority*, 92 ERA-46 and 50 (Sec'y Apr. 20, 1995). On the other hand, when denial of a promotion, re-assignment, and suspension of certification all related to a common subject matter of cross-training, these acts constituted a continuing violation. *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993). If an employee faces a series of imposed employment restrictions, such as work re-assignment, isolation from co-workers, and different qualification standards, which adversely affect his or her ability to advance, such a pattern of discrimination may warrant tolling the statute of limitations. *Simmons v. Arizona Public Service Co.*, 93-ERA-5 (Sec'y May 9, 1995).

As a second consideration, the court suggested the following query: are the acts recurring, such as a bi-weekly event, rather than isolated work assignments or employment decisions? *Berry* 715 F.2d at 981. When confronted with recurring discrimination, a complainant will not be required to file suit when initial discrimination occurs. *Roberts v. North American Rockwell, Corp.*, 650 F.2d 823 (6th Cir. 1981). At the same time, the courts and usually the Secretary will not permit a continuing violation tolling of the statute of limitations on the basis that there are natural and continuing effects of a consummated act. *Ballentine v. Tennessee Valley Authority*, 91-ERA-23 (Sec'y Sept. 23, 1992); and, *Howard v. Tennessee Valley Authority*, 90-ERA-24 (Sec'y Jul. 3, 1991) *aff'd sub nom. Howard v. United States Department of Labor*, 959 F.2d 234 (6th Cir. 1992). For example, even though a demotion will have the continuing effect of reduced pay, the thirty day complaint requirement usually may not be tolled because the loss of pay continues. *English v. General Electric Co.*, 85-ERA-2 (Sec'y Feb. 13, 1992) and *Bassett v. Niagara Mohawk Power Co.* 86-ERA-2 (Sec'y Sept. 28, 1993). Compare, *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Jul. 26, 1995) (demotion accompanied by loss of pay is a continuing violation). Just alleging that several acts create a hostile work environment is not sufficient if the acts are isolated employment decisions, lack common subject matter, and are not the same type of discrimination. *Holtzclaw v. Commonwealth of Kentucky Natural Resources and Environmental Protection*

discrimination. *Egenrieder v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Order of Remand, Apr. 20, 1987, slip op. at 4.

Cabinet., 95-CAA-7 (ARB Feb. 13, 1997). In such a case, each discrete act of discrimination will begin its own thirty day clock for filing a complaint. *London v. Cooper & Lybrand*, 644 F.2d 811, 816 (9th Cir. 1991).

The court believed the third question in the continuing violation analysis was the most important. Do the individual acts lack a permanent nature which would have triggered the complainant's awareness of, and the duty to, assert his or her rights? *Berry*, 715 F.2d at 981. This degree of permanence should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), quoting the *Berry* decision. If an employee is reasonably aware of an adverse action that needs no additional discriminatory intent to continue, then the employee is expected to comply with the thirty day time limit for filing a complaint.

Additional Findings

As a preface to the evaluating whether the continuing violation exception applies in Mr. Ilgenfritz's case, identification of the three alleged protected activities is helpful.²⁷ As previously mentioned, the first alleged protected activity occurred in October 1995 when Mr. Ilgenfritz reported an oil spill. Then, in May 1996, Mr. Ilgenfritz reported to Mr. Berkman in the Environmental Section that he had been ordered to improperly throw away a grit blaster which had been identified as part of a hazardous waste stream. Finally, near the end of May 1996, Mr. Ilgenfritz called LT (jg) Opstrup at the Environmental Section suggesting he evaluate paint chips that were being left on the ground during the repainting of the U.S. Coast Guard emblem on the side of the steam plant.

Mr. Ilgenfritz developed a perception of a hostile work environment where his environmental activities were not appreciated or welcomed. However, his assertion of hostile work environment is based on perceived harassment stemming from several discrete supervisor actions.²⁸

Denial of leave request - January 1996. In January 1996, Mr. Bergeron denied Mr. Ilgenfritz's leave application for January 17, 1996 (CX 34). Mr. Bergeron stated the shop was down one man and another worker had a medical appointment. He urged Mr. Ilgenfritz to reapply at another time. Despite these statements, and because Mr. Ilgenfritz believed no one else had ever

²⁷Whether each of these incidents amounts to a protected activity will be discussed later.

²⁸Mr. Ilgenfritz also recounted that one day he found a derogatory comment about him on a sign in the work place. But, he doesn't know who wrote the comment. In addition, Mr. Ilgenfritz in August 1997 found that the lock on his tool locker had been cut. In this case, the record establishes a co-worker and not any supervisor cut the lock. I have not included these two incidents because the evidence does not establish that a supervisor was involved. I also have not included the last performance appraisal. Although it was accomplished in May 1997 and would have ordinarily fallen within the hostile environment time frame, Mr. Ilgenfritz was not aware of the appraisal until October 1998. As a result, the appraisal was not part of the work environment Mr. Ilgenfritz experienced during the relevant time frame of 1996 to September 1998.

been denied leave, he concluded the denial was retaliation for his making waves.

Removal of desk and phone in tool room - June 1996. Shortly after reporting the disposal of the grit blaster and paint chips, Mr. Ilgenfritz came into work and found a desk and phone that had been located in the tool room where gone. Mr. Ilgenfritz had used the desk and phone for his HMC duties. His materials that had been on the desk were simply piled on a work bench. He later learned that Mr. Simmons had directed Mr. Bergeron to remove the desk and phone.

Replacement of microwave oven - June 1996. Around June 1996, Mr. Ilgenfritz broke the microwave oven in the steam plant. Mr. Bergeron indicated he had received a complaint from another worker about the damaged microwave and asked Mr. Ilgenfritz to make restitution. Mr. Ilgenfritz complied by bringing in a replacement oven, but he felt the incident was blown out of proportion.

Denial of computer access - June 1996. During June 1996, Mr. Bergeron changed a password on his computer which effectively prevented Mr. Ilgenfritz from using the computer for HMC duties.

Denial of overtime pay - July 1996. In mid-July 1996, Mr. Bergeron denied Mr. Ilgenfritz's request for overtime on one day.

Removal of HMC duties - August 1996. In early August 1996, Mr. Bergeron removed the collateral duty of HMC from Mr. Ilgenfritz and appointed Mr. Hancock the steam plant HMC. Mr. Bergeron stated the re-assignment was consistent with his rotation policy for the HMC collateral duty. But, Mr. Ilgenfritz had been the HMC for over two years and never heard of the rotation policy. Although there was no loss of pay, Mr. Ilgenfritz considered the removal of HMC duties as a demotion.

Boiler operations re-training - fall 1996. After Mr. Ilgenfritz had difficulty lighting a boiler, Mr. Simmons directed that he be retrained in boiler operations. Since Mr. Ilgenfritz had extensive boiler experience, he felt the additional training was an attempt to increase pressure on him.

Debarment letter - June 1997. Even though Mr. Ilgenfritz left work on April 7, 1997 and was in leave without pay status receiving disability benefits, he still occasionally returned to the steam plant to check his mail. In June 1997, Mr. Bergeron sent Mr. Ilgenfritz a letter debarring him from the steam plant due to construction. However, because he believed other people were still permitted in the plant, Mr. Ilgenfritz viewed the letter as a punitive action.

Use of certified mail - fall 1997. Despite Mr. Ilgenfritz's request to stop the practice, Mr. Bergeron continued to send personnel correspondence to Mr. Ilgenfritz by certified mail which inconvenienced Mr. Ilgenfritz.

Delayed supervisor statement - August 1998. After receiving notice in June 1998 that he

needed to make a decision on his future employment the USCGA, Mr. Ilgenfritz chose disability retirement. As part of the process in August 1998, he sent Mr. Bergeron a supervisor statement for him to complete. Mr. Ilgenfritz perceives that while Mr. Bergeron delayed completion of the document, the USCGA proceeded with the separation action.

Separation action - September 3, 1998. On September 3, 1998, Mr. Ilgenfritz received notice that CDR Brown had decided to separate Mr. Ilgenfritz due to his physical inability to return to work. Because Mr. Ilgenfritz had been working with USCGA personnel on a disability retirement, he was disturbed that the USCGA proceeded with separation action.

Without addressing whether each incident amounts to an adverse supervisor action, five of the eleven incidents may be excluded from the continuing violation analysis because they were permanent actions and not linked by a common subject matter. I find the denial of leave, replacement of microwave, denial of overtime, boiler operations re-training, and debarment while in leave without pay status were discrete supervisor actions with a significant degree of permanence that involved disparate facts. I also believe the alleged delayed completion of a supervisor statement and use of certified mail were singular supervisor actions without a common link to the other supervisor events.

Arguably, of the four remaining incidents, the following three actions may tie together as a continuing violation: the removal of office equipment, denial of computer access, and loss of the HMC collateral duty. All three actions occurred in the summer of 1996 and were taken by the same supervisor, Mr. Bergeron. And, each action adversely affected Mr. Ilgenfritz's ability to work as an HMC. But, those events are time-barred under the statutory employee protection provisions unless they are linked to the September 1998 incident involving Mr. Ilgenfritz's separation from employment.

After considering the facts in this case, I find the connection between the three events in the summer of 1996 and the separation action two years later in September 1998 too tenuous to establish a continuing pattern of discrimination. In addition to the passage of two years, both the supervisor who took the separation action and the effect of the action were different from the earlier three events. Concerning the supervisor taking the action, Mr. Bergeron did play a role in the separation action by sending the initial notices of the personnel action to Mr. Ilgenfritz. But, CDR Brown, and not Mr. Bergeron, was the supervisor who separated Mr. Ilgenfritz for disability. And, LCDR Stephanos, who did not even arrive at the Academy until after Mr. Ilgenfritz had already departed, was the primary force behind the separation action. As to the effect of the separation, it removed Mr. Ilgenfritz from his position as a mechanic and not his HMC duties. By the time of the separation action, Mr. Ilgenfritz had not done any HMC work for over two years. He was removed from his collateral duty as HMC in August 1996. For the next several months, he worked full time as a steam plant mechanic before going out on worker's compensation in April 1997. Between his departure from work and the September 1998 separation action, Mr. Ilgenfritz did not work at all at the USCGA. At the time of his separation, Mr. Ilgenfritz was in leave without pay status.

More significantly, in addition to the above step by step analysis, the facts in this case do not

seem to fit the stated purpose for the continuing violation exception. Waiver of the thirty day filing requirement is appropriate if it's unfair to hold a complainant accountable for filing a complaint in timely manner when the discrimination only becomes apparent over the course of time through a connected pattern. As discussed earlier, between June and October 1996, and then again in June 1997, Mr. Ilgenfritz expressed his opinion that a discriminatory motive existed. The September 1998 separation action was not the event which finally triggered Mr. Ilgenfritz's perception that he was suffering retaliation due to whistle blowing. Instead, the events of the summer of 1996 lead to that conclusion. It is not unreasonable or unfair to have required Mr. Ilgenfritz to comply with the filing provisions of the environment statutes at the time he concluded that a discrimination cause of action existed.

Finally, I find Mr. Ilgenfritz has not established that Mr. Bergeron, Mr. Simmons, or CDR Brown engaged in a systematic pattern of discrimination against all workers under their supervision for environmental activities.

Conclusion

Mr. Ilgenfritz did not file a complaint concerning a hostile work environment within thirty days of the last alleged violation (other than the separation action) which occurred in August 1998. There is no basis for equitable tolling of the thirty day requirement. Likewise, there was not a continuing violation through the September 3, 1998 separation action. Accordingly, the portion of the October 2, 1998 complaint relating to a hostile work environment, other than the separation action, is untimely and should be dismissed.

Issue # 2 - Timeliness of the Performance Appraisal Complaint

In his November 3, 1998 complaint, Mr. Ilgenfritz alleges that the negative comments in his last performance appraisal, dated May 1, 1997, (CX 104 and 105) amount to retaliation for protected activities. Since he did not receive the appraisal until October 28, 1998 as part of his disability retirement package, Mr. Ilgenfritz asserts his complaint is timely.

The respondent maintains that since the appraisal was completed in May 1997 and Mr. Ilgenfritz had the ability to review the document at any time, his complaint of November 3, 1998 is untimely.

Principles

The dispute about the timeliness of the performance appraisal complaint is resolved by referring to the principles in two appellate decisions. As previously mentioned, the statutory and regulatory time limit for filing a complaint is thirty days from the alleged violation. Interpreting the regulations and statutes, the Administrative Review Board has held that the date of discovery

of the alleged violation or retaliatory act starts the time limit for filing a complaint. *Freels v. Lockheed Martin Energy Systems, Inc.*, 94-ERA-6 (ARB Dec. 4, 1996) and *Pantanizopoulos v. Tennessee Valley Authority*, 96-ERA-15 (ARB Oct. 20, 1997). It is the actual knowledge of the employer's action that establishes the when a complainant is put on notice that a violation has occurred. See *Billings v. Tennessee Valley Authority*, 86-ERA-38 (Sec'y June 28, 1990), *aff'd without opinion*, 923 F.2d 854 (6th Cir. 1991).

Additional Findings

In April 1997, Mr. Bergeron completed and signed the performance appraisal for April 1996 to March 1997. He then sent the appraisal to the appropriate personnel specialist. Mr. Bergeron did not send a copy to Mr. Ilgenfritz and he did not discuss the appraisal with Mr. Ilgenfritz subsequent to the completion of the evaluation. The appraisal certainly was available to Mr. Ilgenfritz if he wanted to see it. However, according to Ms. Hafey, the respondent's personnel specialist, Mr. Bergeron, as a supervisor, was responsible for providing Mr. Ilgenfritz with a copy of the appraisal. Mr. Ilgenfritz had no obligation or duty to track it down. Mr. Ilgenfritz first became aware of the alleged adverse comments in the appraisal when he received a copy of the appraisal with his disability retirement package on October 28, 1998. Accordingly, I find October 28, 1998 is the date Mr. Ilgenfritz actually obtained knowledge of Mr. Bergeron's remarks in the April 1996 to March 1997 appraisal. As a result, October 28, 1998 represents the start of the thirty day filing time period. Mr. Ilgenfritz mailed his complaint case concerning this performance appraisal on November 3, 1998, well within the required thirty day filing requirement.

Conclusion

Because Mr. Ilgenfritz filed his complaint about a retaliatory performance report within thirty days of his actual knowledge of the appraisal, I find the November 3, 1998 complaint is timely.

Issue # 3 - Retaliatory Hostile Work Environment

Since I have determined that the portion of the October 2, 1998 complaint relating to a hostile environment is untimely, I will not address this issue. However, the events which occurred in Mr. Ilgenfritz's work place remain relevant on the question of motivation behind the last performance appraisal and the separation from employment.

Issue # 4 - Retaliatory Performance Appraisal

On October 28, 1998, Mr. Ilgenfritz received his last performance appraisal which covered his employment from April 1, 1996 to March 31, 1997 (CX 104 and 105). The overall performance rating was "proficient." But, in relation to job knowledge, Mr. Bergeron observed that Mr. Ilgenfritz had a problem during the twelve month rating period completing repairs in a timely manner. Also, in the section discussing Mr. Ilgenfritz's ability to work with others, Mr. Bergeron described Mr. Ilgenfritz as a loner and stated he did not interact much with other employees in the

plant. This appraisal differs from the prior annual evaluations because none of the earlier appraisals contained any uncomplimentary observations. Mr. Ilgenfritz's alleged protected activities occurred between October 1995 and June 1996. Mr. Ilgenfritz asserts Mr. Bergeron placed the two negative observations in the evaluation in retaliation for his protected activities

The respondent maintains the comments are not reprisal. Instead, Mr. Bergeron's comments are accurate and reasonable based on his supervision of Mr. Ilgenfritz in 1996 and 1997. Mr. Bergeron did not have any discriminatory motive when he authored the appraisal.

*Complainant's Prima Facie Case*²⁹

In environmental whistle blower cases, the complainant has an initial burden of proof to make a *prima facie* case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and, (3) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996), and *Passaic Valley Sewerage Commissioners v. United States Depart. of Labor*, No. 92-3261 (3rd Cir. Apr. 16, 1993)(available at 1993 U.S. App. LEXIS 7906).

Turning to the first element of the *prima facie* case, I am guided by secretarial decisions on what action constitutes a protected activity. Essentially, the Secretary has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the environmental acts.³⁰ While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. In other words, the standard involves an objective assessment. The subjective belief of the complaint is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). In the *Minard* case, the Secretary indicated the complainant must have reasonable belief that

²⁹In a fully litigated case, the analysis of a *prima facie* case may not serve any useful purpose since the final decision will rest on the complainant's ultimate burden of proof. See *Carter v. Electrical District No. 2 of Pinal*, 92-TSC-11 (Sec'y Jul. 26, 1995). The parties in Mr. Ilgenfritz's case spent three days fully litigating the present case. However, I find the working through the *prima facie* elements useful since the ultimate burden of proof still involves many of the elements covered in the *prima facie* analysis. In addition, if the complainant, even in a fully litigated hearing, fails to establish an element of the *prima facie* case, evaluating whether an ultimate burden of proof is met may not serve any purpose.

³⁰However, a complainant's inability to specify the controlling environmental regulation is not determinative of whether he or she engaged in a protected activity. See *Oliver v. Hydro-Vac Services, Inc.*, 91-SWD-1 (Sec'y Nov. 1, 1995);

the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Finally, an internal environmental complaint is covered under the employee protection provisions of the environmental statutes. *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y Mar. 24, 1995). According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her environmental concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987)(order of remand).³¹ The report may be made to a supervisor, or through an internal complaint or quality control system, or to an environmental staff member. *Williams v. TIW Fabrication & Machining, Inc.* 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993); and, *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

The second element involves the determination of an adverse action. Actions with respect to an employee's compensation, terms, condition, or privileges of employment are covered under the environmental employee protection provisions and may be considered adverse actions. *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994) citing *DeFord v. Secretary of Labor*, 700 f.2d 281, 283, 287 (6th Cir. 1983). The narrative in a performance appraisal may constitute adverse action, even if the ultimate rating does not. *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 and 5, 93-CAA-1 and 94-CAA-2 and 3, slip op. at 32 (ARB Jun. 14, 1996) citing *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34, slip op. at 4 (Sec'y Sept. 28, 1993).

To prevail on the third element of the *prima facie* case, a complainant only needs to establish a reasonable inference that his or her protected activity lead to, or caused, the respondent's adverse action. This burden to show an inference of unlawful discrimination is not onerous. *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993). At this point of the process, the complainant need only present evidence sufficient to prevail until contradicted and overcome by other evidence. *Jackson v. The Comfort Inn, Downtown*, 93-CAA-7 (Sec'y Mar. 16, 1995), citing *Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y Feb. 15, 1995), slip op. at 11. In that regard, the Secretary has noted that one factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). Close temporal proximity may be legally sufficient to establish the causation, or third element, of the *prima facie* case. *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan. 5, 1993). Findings of a causation based on closeness in time have ranged from two days (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 7) to about one

³¹The United States Court of Appeals for the Second Circuit has jurisdiction in this case because the incidents occurred in New London, Connecticut. The Secretary in *Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2 (Sec'y July 9, 1986) interpreted the Second Circuit case *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) as support for including internal reports.

year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993)).

On the other hand, just as temporal proximity may be a factor in showing an inference of causation, the lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply System*, 95-ERA-52 (ARB Jul. 30, 1996), citing *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995). If a significant period of time lapses between the time the respondent is aware of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Shusterman v. Ebasco Serv., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992), slip op. at 8-9.

Respondent's Burden to Produce Evidence

If the complainant presents a *prima facie* case showing that protected activity motivated the respondent to take an adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. In other words, the respondent must show it would have taken the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989).

Complainant's Ultimate Burden of Proof

If the respondent does present evidence of a legitimate purpose, the final step in the adjudication process is to determine whether the complainant, by the preponderance of the evidence, can establish the respondent's proffered reason is not the true reason for the adverse action. In this final step, the complainant has the ultimate burden of persuasion as to the existence of retaliatory discrimination. The complainant may meet that burden by showing the unlawful reason more likely motivated the respondent to take the adverse action. Or, the complainant may show the respondent's proffered explanation is not credible. See *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y Jun. 28, 1991); and, *Darty v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983).

One final observation on the last step of determining the actual motive for the adverse action. Even though acts of adverse action have been found untimely for the purposes of filing a complaint, they may nevertheless be relevant background evidence that illuminates present behavior concerning a non-timed barred adverse action. *Malhotra v. Cotter & Co.*, 885 F.2 at 1310.

Additional Findings

Protected Activities

On October 23, 1995, upon arriving at the USCGA steam boiler plant, Mr. Ilgenfritz discovered from a conversation with other plant employees that fuel oil had leaked from the holding tank on an emergency generator. Mr. Ilgenfritz examined the site and determined that about twenty-five gallons of fuel oil had split onto the ground. He reported the oil spill to his supervisor, Mr. Bergeron, and sent an electronic message to the USCGA hazardous materials officer. Eventually, a contractor cleaned up the oil spill and contaminated ground.

Since the purposes of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (CERCLA) and the Solid Waste Disposal Act (Resource Conservation and Recovery Act), 42 U.S.C. § 6971 (RCRA) are to implement a uniform process for the disposal of hazardous waste and to ensure discarded materials are disposed of in an environmentally sound manner, Mr. Ilgenfritz's report of the oil spill at a minimum "touches" on the environmental purposes of these two statutes. I find his oil spill report was a protected activity.

On May 20, 1996, as part of a clean-up of the USCGA for a presidential visit, Mr. Simmons directed Mr. Bergeron to dispose of a grit blaster by throwing it in a dumpster. This grit blaster had been previously identified as a part of hazardous waste stream because it generated, as a by-product, hazardous waste consisting of grit contaminated with paint fragments containing heavy metal. The grit blaster had been removed from service about a year earlier and cleaned out. Mr. Bergeron directed Mr. Ilgenfritz to assist him with the disposal of the machine and they threw it away in a dumpster. In response, Mr. Ilgenfritz reported the incident to an official responsible for government property in terms of improper disposal of government property. He also reported the act to Mr. Berkman in the Environmental Section as an environmental problem. Mr. Berkman passed the information on to his supervisor. However, neither Mr. Ilgenfritz nor Mr. Berkman received any reply as to Mr. Ilgenfritz's environmental report.

The key issue about the grit blaster is whether Mr. Ilgenfritz had a reasonable basis for believing the grit blaster was contaminated with hazardous material. Because the grit blaster had been a hazardous waste generator, was part of an identified hazardous waste stream, and had not been tested to determine whether any residual hazardous waste remained in the grit blaster, I find Mr. Ilgenfritz's belief to be reasonable. As a result, his report of the dumping of the grit blaster to Mr. Beckman was a protected activity that furthered the purposes of CERCLA and RCRA. At the same time, because Mr. Ilgenfritz did not inform his supervisor, the property manager, or CWO Eybel of his environmental concern about the grit blaster, I do not believe his reports of the grit blaster disposal to anyone other than Mr. Berkman were protected activities.³²

On May 28, 1996, Mr. Ilgenfritz observed a co-worker removing paint from the U.S. Coast Guard emblem on the side of the boiler plant building. The removed paint was just lying on the

³²Mr. Ilgenfritz believes he did mention to CWO Eybel that the grit blaster was part of a hazardous waste stream. However, I find more reliable CWO Eybel's definite recollection that Mr. Ilgenfritz did not mention any environmental concern about the grit blaster. As a result, I find Mr. Ilgenfritz did not inform CWO Eybel that the grit blaster presented an environmental hazard.

ground. Due to the richness of the paint color, Mr. Ilgenfritz suspected the paint contained heavy metal. So, he called LT (jg) Opstrup, the USCGA hazardous materials officer, and suggested he test the paint. LT (jg) Opstrup followed Mr. Ilgenfritz's advice, tested the paint chips, and discovered they contained the heavy metal cadmium. Eventually, the paint chips were cleaned up. Mr. Ilgenfritz had asked LT (jg) Opstrup to keep Mr. Ilgenfritz's report confidential. Mr. Ilgenfritz also told Mr. Bergeron about the paint chips being removed from the wall, but did not disclose his report to LT (jg) Opstrup.³³ I find Mr. Ilgenfritz's reports to LT (jg) Opstrup and Mr. Bergeron concerning the paint chips were consistent with the purposes of RCRA and consequently protected activities.

Adverse Action

Sometime in April 1997, Mr. Bergeron completed Mr. Ilgenfritz's performance appraisal covering a period from April 1, 1996 to March 31, 1997. He gave Mr. Ilgenfritz an overall rating of "proficient." He characterized Mr. Ilgenfritz's work in the hazardous waste area as "good" and commended him as the "haz-mat person." Mr. Bergeron also indicated Mr. Ilgenfritz had a problem the entire reporting period making timely repairs. In the area of ability to work with others, Mr. Bergeron stated Mr. Ilgenfritz was not very interactive with co-workers and tended to be "a bit of a loner."

Within the four corners of the appraisal, the observations about slow repairs and minimal interaction are negative comments. Each refers to a specific requirement in the performance standards that establish the tasks to be accomplished during the year. The remarks document for future supervisors that during this performance period, while meeting standards overall, Mr. Ilgenfritz fell short of at least two expectations.

Inference of Retaliatory Discrimination

A preliminary step in considering whether an inference may be reached based on temporal proximity is determining whether the supervisor who took the adverse action was aware of the protected activity. Since Mr. Ilgenfritz reported both the oil spill and paint chips deposit to Mr. Bergeron, that requirement is met for those two protected activities. However, while Mr. Bergeron knew about Mr. Ilgenfritz's report to the property manager about the grit blaster, which I have determined was not a protected activity, the evidence is insufficient to show that Mr. Bergeron knew about Mr. Ilgenfritz's environmental report to Mr. Berkman, which I believe is a protected activity.³⁴

³³Mr. Bergeron doesn't remember whether the paint chips were hazardous material. I do not believe his testimony is sufficient contrary evidence to Mr. Ilgenfritz's testimony that he did tell Mr. Bergeron about the paint chips. As a result, regardless of whether Mr. Bergeron now remembers the information, I find Mr. Ilgenfritz did inform Mr. Bergeron of the problem.

³⁴Mr. Ilgenfritz believes that since he told CWO Eybel that the grit blaster was part of a hazardous waste stream and CWO Eybel eventually talked to Mr. Bergeron about the grit blaster, Mr. Bergeron must have known about his environmental concern. However, both Mr. Bergeron and CWO Eybel testified Mr. Ilgenfritz did not mention to them any environment problem with the grit blaster. In addition, Mr. Berkman did not pass on to Mr. Bergeron, Mr. Ilgenfritz's environmental complaint about the machine. I find the preponderance of the evidence

Accordingly, I find the only two protected activities that might have lead to an adverse action by Mr. Bergeron are the reports of an oil spill and the paint chip removal

The next step is to consider the actual time span between the protection activity and the alleged adverse action. Because the oil spill occurred in October 1995 and Mr. Bergeron completed the appraisal in April 1997, I find the time span of nearly a year and a half too lengthy to reach an inference of a causal connection between report of the oil spill and the two remarks in the appraisal. In fact, the oil spill incident occurred during the prior performance appraisal period of April 1995 to March 1996 and that performance report did not contain any negative comments. At the same time, because less than a year passed between Mr. Ilgenfritz's discovery of the paint chips and Mr. Bergeron's appraisal, I draw an inference of a causal relationship between that one protected activity and the performance report negative remarks. Such an inference is also partially supported by the fact that Mr. Bergeron did not place any negative comments in the four annual appraisals that preceded the March 1996 to April 1997 rating. As a result, Mr. Ilgenfritz has established a *prima facie* case that his report to Mr. Bergeron of paint chip deposits lead to the adverse comments in the appraisal.

Legitimate Purpose

To rebut the inference of unlawful discrimination, the respondent presented the testimony and affidavit of Mr. Bergeron. Mr. Bergeron denies any retaliatory intent concerning the appraisal. He states the narrative comments are accurate observations. Rather than punish Mr. Ilgenfritz concerning his hazardous waste duties, Mr. Bergeron points out that he had positive comments about that part of Mr. Ilgenfritz's performance. Concerning the delayed repairs, Mr. Bergeron was able to recall repair of a boiler sight glass as an example. Mr. Bergeron also mentioned that a co-worker had complained to him about Mr. Ilgenfritz damaging the shop microwave. Mr. Bergeron's testimony represents evidence of a legitimate purpose for the performance report observations.

Ultimate Burden of Proof

Since the respondent, through Mr. Bergeron's testimony, has presented evidence that the comments in the performance appraisal were legitimate, the ultimate burden of proof falls to Mr. Ilgenfritz to show that Mr. Bergeron's explanation is not credible or that retaliation was the most likely reason for the negative appraisal comments. For the following reasons, I find the preponderance of the evidence does not establish that the negative comments in the March 1996 to April 1997 were made in retaliation for Mr. Ilgenfritz's protected activity of reporting the paint chips.

First, in making my determination, I have considered the events that occurred during the summer of 1996 as reflective of Mr. Bergeron's attitude toward Mr. Ilgenfritz. Mr. Ilgenfritz's perception of discrimination by Mr. Bergeron is understandable. Within a month or two of his reports about the grit blaster and the paint chips, Mr. Bergeron suddenly denied Mr. Ilgenfritz

indicates Mr. Bergeron did not know Mr. Ilgenfritz had made an environmental report about the grit blaster.

computer access, removed his work area, and transferred him from hazardous material duty after Mr. Ilgenfritz had served in that position for over two years. Likewise, I have no doubt Mr. Ilgenfritz was very frustrated by the lack of positive response he received for his hard work in the hazardous materials area. However, the record contains credible evidence to substantiate the remarks in the appraisal and to support Mr. Bergeron's statement that when he wrote the comments in April 1997 he was not attempting to retaliate against Mr. Ilgenfritz for any protected activity. There is evidence independent of the appraisal that Mr. Bergeron had discussed with Mr. Ilgenfritz early in the appraisal period the need to interact better with co-workers. Specifically, in June 1996, after the microwave dispute, Mr. Bergeron counseled Mr. Ilgenfritz that he expected him to work out his bad feelings against another co-worker (CX 36, 37, and 38). On the same theme, the affidavits of two co-workers, Mr. Piermattei and Mr. Williams, coupled with the microwave incident, provide further support for Mr. Bergeron's observations about Mr. Ilgenfritz's ability to interact with the other steam plant workers. The same two co-workers also provide information indicating Mr. Ilgenfritz was having difficulty with his work as a mechanic which is consistent with Mr. Bergeron's recollection of the slow repair to the boiler sight glass and the appraisal remarks on completing repairs in a timely manner.

Second, in addition to the corroborative evidence, I found Mr. Bergeron a credible witness in regards to the performance appraisal based on his presentation and demeanor at the hearing. I also find the positive comments in the appraisal concerning Mr. Ilgenfritz's hazardous material efforts consistent with Mr. Bergeron's assertion that he harbored no ill will towards Mr. Ilgenfritz for his environmental work when he accomplished the appraisal in April 1997.

Third, Mr. Ilgenfritz bears the ultimate burden of proof on the issue of the reprisal appraisal. While there is circumstantial evidence from the first part of 1996 supportive of Mr. Ilgenfritz's perception of discrimination, I do not believe that evidence outweighs the other evidence in the record supporting Mr. Bergeron's performance remarks. As a result, I find the preponderance of the evidence in the form of Mr. Bergeron's testimony, the counseling memorandum from June 1996, the affidavits of Mr. Piermattei and Mr. Williams, and the positive observations about Mr. Ilgenfritz's hazardous materials work in the April 1996 to March 1997 performance appraisal establishes that the two negative observations in the evaluation were legitimate and would have been present even if Mr. Ilgenfritz had not engaged in his protected activity of reporting the paint chips.

Conclusion

Mr. Ilgenfritz has failed to meet his ultimate burden of proof. The preponderance of the evidence does not establish that Mr. Bergeron included two negative performance appraisal comments due to Mr. Ilgenfritz's protected activity. Accordingly, Mr. Ilgenfritz's November 3, 1998 complaint alleging an unlawful discrimination in his last civilian performance appraisal should be dismissed.

Issue # 5 - Retaliatory Separation Action

On September 3, 1998, Mr. Ilgenfritz received notice of CDR Brown's decision to involuntarily remove him from employment at the USCGA due to disability. Mr. Ilgenfritz asserts this separation action is the final retaliation for his protected environmental activities. Although he was physically unable to return to work as a mechanic, Mr. Ilgenfritz thinks the USCGA declined to consider any accommodation of his physical disability.

The respondent maintains the separation was appropriate due to Mr. Ilgenfritz's inability to return to work. Mr. Ilgenfritz was not treated any differently than another employee who was also separated for disability.

Principles

To resolve this issue, the same principles and process discussed on the issue of the performance appraisal apply. The only additional principle is fairly obvious, I believe an involuntary separation action, the termination of a complainant's ability to work for the respondent, is an adverse action.

Additional Findings

Protected Activity and Adverse Action

In considering whether Mr. Ilgenfritz has established a *prima facie*, I find he is able to establish the first two elements. The report to Mr. Berkman about the grit blaster and the other reports concerning the oil spill and paint chips were protected activities. And, his involuntary separation from the USCGA is an adverse action.

Inference of Retaliatory Discrimination

Nearly two years passed from the time CDR Brown became aware in October 1996 of Mr. Ilgenfritz's last protected activity concerning the paint chips and CDR Brown's decision to involuntarily separate Mr. Ilgenfritz in September 1998. Based on this lengthy lapse of time, there is an inference that the paint chips incident did not motivated CDR Brown to separate Mr. Ilgenfritz.³⁵ In addition, there is a legitimate intervening cause in this case - Mr. Ilgenfritz's physical inability to return to his work as a boiler plant mechanic. There is insufficient evidence to sustain a reasonable inference that Mr. Ilgenfritz's protected activity lead to his separation. As a result, he not able to establish the third necessary element of a *prima facie* case.

³⁵Based on CDR Brown's credible testimony, I find he only had knowledge of the paint chip report as a protected activity. He was not aware of the oil spill report. Although Mr. Ilgenfritz did discuss the grit blaster incident with CDR Brown, he did not share his environmental concern. And, there is no evidence Mr. Berkman passed on Mr. Ilgenfritz's environment concern about the grit blaster to CDR Brown. Even if CDR Brown had been aware of the environmental problem with the grit blaster disposal, October 1996 still remains the latest date he became aware of Mr. Ilgenfritz's activities. As the result, the analysis concerning temporal proximity doesn't change.

Ultimate Burden of Proof

Even if I had determined Mr. Ilgenfritz had established a *prima facie* case, he clearly does not prevail on the ultimate burden of proof because the evidence in the record establishes that CDR Brown did not base his separation decision on Mr. Ilgenfritz's protected activities. Though he was aware of the paint chip report, CDR Brown provided credible testimony that Mr. Ilgenfritz's separation had nothing to do with his environmental activity. Although Mr. Bergeron and Mr. Simmons provided assistance during the separation process, CDR Brown made his decision based on the recommendation of LCDR Stephanos. LCDR Stephanos, who arrived on the scene in July 1997, presented credible testimony that he was unaware of any environmental activities of Mr. Ilgenfritz. No one ever mentioned anything to him about an oil spill, grit blaster, or paint chips. LCDR Stephanos' sole motivation was to replace the two temporary employees at the boiler plant who were filling in for Mr. Ilgenfritz and Mr. Herman with permanent employees. The entire separation process was accomplished according to USCGA regulations and overseen by a personnel specialist, Ms. Hafey.³⁶

The respondent, through CDR Brown, separated Mr. Ilgenfritz from the USCGA for a reasonable, legitimate purpose. Mr. Ilgenfritz started at the steam plant in 1991 as a boiler mechanic and stood watch as an boiler operator. Those jobs involved heavy labor at times (CX 7) and required the ability to climb ladders and lift heavy objects. Though the percentage of his mechanical work declined during his tenure as an HMC, Mr. Ilgenfritz was still a boiler plant mechanic. And, once he lost the HMC duties, Mr. Ilgenfritz resumed full time the job he had been hired to do - boiler plant mechanic. When Mr. Ilgenfritz's unfortunate shoulder illness worsened, he was no longer able to lift his arms up to work and accomplish necessary tasks. As a result, he stopped working at the USCGA in April 1997 and started receiving disability payments through the federal worker's compensation program. The respondent provided Mr. Ilgenfritz over a year to recover from his disability and return to work. In fact, at the time Mr. Ilgenfritz departed in April 1997, Mr. Bergeron demonstrated his perception that Mr. Ilgenfritz would eventually return to work by allowing Mr. Ilgenfritz to keep a government tool bag in a tool locker. The respondent had hired a temporary employee to take Mr. Ilgenfritz's place during his absence. But, with the lengthy passage of time and the medical determination that Mr. Ilgenfritz is no longer physically able to perform the heavy labor associated with the job of boiler plant mechanic, the respondent reasonably decided to involuntarily separate Mr. Ilgenfritz and hire a permanent employee.

On the issue of accommodation, although he didn't formally apply for accommodation because he had been told no positions were available, Mr. Ilgenfritz asserts he could have remained a federal employee at the USCGA in the steam plant in an administrative capacity. But, from 1991 to present, there has never been an administrative position designated at the steam plant. The

³⁶At the hearing, Mr. Bergeron indicated that rather than hire another mechanic, they filled Mr. Ilgenfritz's position with an operator. Mr. Bergeron acknowledged he had long believed the steam plant only needed one mechanic. However, there is no evidence in the record that LCDR Stephanos or CDR Brown were influenced by, or even aware of, Mr. Bergeron's concept that the ideal work force at the plant included only one mechanic.

respondent was not under any obligation to create such a position. In addition, Ms. Hafey provided credible testimony that accommodation was considered. However, without creating a new position, there were no positions available at the USCGA. Ms. Hafey also expressed a concern that an offer of accommodation may have jeopardized Mr. Ilgenfritz's ability to obtain re-training benefits.

Further support for a finding that retaliation was not a factor in Mr. Ilgenfritz's situation is the fact that all the supervisors involved in his separation took the same personnel actions with Mr. Herman. Mr. Herman worked in the steam plant, but was not engaged in any protected environmental activity. Yet, when Mr. Herman left the steam plant due to a physical disability and was unable to return to work, the respondent also involuntarily separated him in a manner similar to Mr. Ilgenfritz's separation action.

Having considered the evidence presented in this case, and for the reasons noted above, I find the September 3, 1998 involuntary separation of Mr. Ilgenfritz from the USCGA was not due to, nor in retaliation of, his protected activities under the environmental statutes. The preponderance of the evidence demonstrates that the USCGA would have separated Mr. Ilgenfritz even if he had not engaged in protected activities.

Conclusion

Mr. Ilgenfritz has failed to establish a *prima facie* case of unlawful discrimination in relation to his separation from employment at the United States Coast Guard Academy. He has also failed to meet his ultimate burden of proof. Accordingly, his October 2, 1998 complaint alleging retaliatory separation action should be dismissed.

RECOMMENDED ORDER³⁷

The portion of the October 2, 1998 complaint relating to a hostile work environment, other than the September 3, 1998 separation action, is **DISMISSED AS UNTIMELY**. The remaining portion of the October 2, 1998 complaint alleging an unlawful September 3, 1998 separation action, and the November 3, 1998 complaint alleging a discriminatory performance appraisal for April 1996 to March 1997 are **DISMISSED**.

³⁷At the close of the hearing, I gave the complainant's counsel permission to provide case cites on the issue of damages for Mr. Ilgenfritz's shoulder injury. On March 4, 1999, I received a post hearing brief consisting of seven pages and containing numerous case cites. On March 5, 1999, I received from counsel for the respondent a Motion for Appropriate Relief asking that I disregard the brief from complainant's counsel on the grounds that I only gave permission for a list of cases but complainant's counsel had submitted a brief. On the same day, complainant's counsel provided a Response to the Motion for Appropriate Relief indicating the brief was filed in response to my request to provide case authority on damages. Considering my recommended order in this case, I will not address the issue of damages or the subsequent brief, motion, and response.

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).